United States Court of Appeals for the Second Circuit



APPENDIX

0116114-74-2527

United States Court of Appeals

For the Second Circuit.

ROSTAM PUBLISHING CO., Plaintiff-Appellant, Appellee,

-against-

ENNIS BUSINESS FORMS INC. (ENTEX PUBLICATION DIVISION),
Defendant-Appellee, Appellant.

On Appeal From the United States District Court for the Southern District of New York

JOINT APPENDIX

STANLEY M. ESTROW Attorney for Plaintiff-Appellant Appellee 529 Fifth Avenue New York, N.Y. 10017 (212) 986-9345 KAYE, SCHOLER, FIERM N. 56 HAYS & HANDLER Attorneys for Defendant-Appellee, Appellant 425 Park Avenue New York, N.Y. 10022 (212) 759-8400 PAGINATION AS IN ORIGINAL COPY

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74 CIV. 868

DATE	PROCEEDINGS	Date Order of Judgment Not
		Judgment Not
Feb 25 74	Filed petition for removal from SUPREME COURT OF STATE OF NEW YORK COUNTY OF NEW YORK .	
Feb 25 74	Filed removal bond in the sum of \$500.00 (FIREMANS 'S FUND)	
14	is calculated 7/13/74.	
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r 75.7	The stay and the state of the s	
18.74	Piled Defts. Memorandum of Law. Piled Defts Notice of Motion. Re: Transfer. ret. 4/23/74.	
18.74 Say 7.74	Piled Answering Affidavit by Stanley M. Estrow in opposition ot defts. motion	
	to change venue.	•
	Filed Pltffs. Memorandum of Law.	
	Filed deft's reply affdyt to pltff's hapers in opposition to deft's motion.	
	Filed deft's reply memorandum.	
Jun 17 74	Filed Defts Affidavit in response to pltffs. 2 affidavits.	
	Filed Pltffs. Additional Affidavit in opposition	
Jul 10.74		
	defts. motion to transfer to Texas.	
ul 15.74	Filed supplemental opposing affidavits.	
Aug 1.74	Filed Memorandum Order. Defts. motion to transfer must be denied. Defts. motion	
	to dismiss the complaint is denied. Pltff. is directed to furnish deft, with	
	copies of all contracts which it alleges were breached, etc. within 20 days. So Ordered Ward J. (mailed notice)	
Aug 2.74	Filed Memo, End. on motion dtd. 4/16/74. Motion denied in accordance with	
i 2.74	memorandum decision filed herewith. Ward J. (mailed notice)	
Sep 23.74		
Sep 23.74	Filed Pltffs. Bill of Particulars.	· · · · · · · · · · · · · · · · · · ·
Sep 24.74	The state of the s	
	extended to 10/13/74. Ward J.	
ep. 25-74	Filed pltff's affdvt & Order to Show Cause for a stay of a action pending in the U.S.D.C. Northern DistrictRet. 9-27-74.	
t. 9-74	Filed affdyt & order extending deft's time to answer amended complaint to 10-27-74	
	Ward, J.	
et 21.74	Filed Order to Show Cause. Re: Staying pltff. from further prosection of this	
	action pending determination of action pending in the Northern District of Texas	L
	ret. 10/18/74.	
ct.21.74	Filed Memo end.on motion dtd. 10/21/74. Motion denied. So Ordered Ward J.	
21 76	(mailed notice) Filed Memo End. on motion dtd.9/25/74. Motion denied . So Ordered Ward J.	
7.1 /4	(mailed notice)	
et .21.74	Filed Deft's Memorandum in support of motion to Stay & in opposition to pltff.s	
	motion.	
et 21.74	Filed Pltffs. Brief in support of Stay.	
et 21.74	Filed Affidavit by Stanley M. Estrow in opposition to defts. Order to Show Cause	KSFEE
ev 1.74	Filed AMSWER. Filed Memorandum Order attached to letter from Stanley M. Estrow dtd. 10/22/74.	
ley 6.74	Pltffs, motion to reargue is denied. Ward J. E (mailed notice)	
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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ROSTAM PUBLISHING CO..

Plaintiff,

74 Civ. 868 R.J.W.

ORDER TO SHOW CAUSE

-against-

ENNIS BUSINESS FORMS, INC. (ENTEX PUBLICATION DIVISION),

Defendant.

Upon the affidavit of Stanley M. Estrow, Esq., sworn to the 13th day of September, 1974, the exhibits annexed thereto, and upon all the proceedings heretofore had herein, and sufficient cause appearing

Let the defendant, Ennis Business Forms, Inc., show cause before this Court at Room 7 in the United States Courthouse, Foley Square, New York City, New York on the 270 day of September, 1974 at/20'clock in the m. why an Order should not be made and entered herein staying the defendant, its attorneys, servants, agents and employees from proceeding with an action now pending in the United States District Court for the Northern District of Texas entitled Ennis Business Forms, Inc., plaintiff, against Rostam Publishing Co., defendant, pending the determination of this action, and for such other and different relief as to this Court may seem just and proper in the premises.

Let service of a copy of this Order upon the defendant or its attorneys in this action, Kaye, Scholer, Fierman, Hays & Handler on or before the day of September, 1974, % m. be deemed good and sufficient service.

Dated: New York, N.Y.

September 7, 1974

U.S. District Judge

- - - - - X

SAME TITLE

- - - - - X

STATE OF NEW YORK)
SS:
COUNTY OF NEW YORK)

STANLEY M. ESTROW, being duly sworn, deposes and says:

- 1. I am the attorney for the plaintiff in this action and have personal knowledge of the following facts.
- in the Supreme Court of the State of New York by the plaintiff on December 1, 1971. A Notice of Appearance was received from the defendant on December 31, 1971. The matter of further pleadings was held in abeyance pending settlement discussions which subsequently failed. Further proceedings were then instituted by the plaintiff and were countered by defendant's Petition for the removal of this action to the United States District Court on February 25, 1974. That application was not opposed.
- 3. Thereafter the defendant, by motion returnable before this Court on the 23rd day of April 1974, sought to transfer this action to the United States District Court for the Northern District of Texas, which motion was opposed by the plaintiff herein. Thereafter this Court, by its Decision and Order entered with the Clerk

of this Court on August 1, 1974 Exhibit Λ , denied the defendant's motion to transfer this action.

- 4. On the 17th day of May, 1974, and after the time that the defendant filed its Petition to remove this action from the New York State Supreme Court to the United States District Court for the Southern District of New York, the defendant caused a Summons and Complaint to be issued out of the F-116th Judicial District Court of Dallas County, Texas, which was served on the plaintiff on May 20, 1974 in New York City by certified mail, Exhibit B, Ennis, the plaintiff in that case, sought a judgment for \$21,798 plus attorney's fees of \$5,000, together with interest and costs for the printing of several issues, which are included in and a part of the plaintiff Rostam's claim for damages in the instant action, Under the Federal Rules of Civil Procedure applicable to the instant action, that claim should and must be made a responsive pleading to the Complaint herein.
- 5. Immediately upon being served with the papers in the State action in Texas referred to in the preceding paragraph, the plaintiff Rostam was forced to and did retain counsel in Dallas, Texas, and caused that action to be removed to the United States District Court for the Northern District of Texas. These facts were revealed to this Court in connection with the defendant Ennis' motion to remove this action to the United States

Court in Texas.

- 6. However, and despite the Order of this Court retaining jurisdiction over the instant action, which will include jurisdiction over any counterclaim to be asserted by the defendant Ennis, Ennis as the plaintiff in the action pending in Texas, instituted two years and five months after the instant action, is proceeding with the processing of the action in Texas and as permitted to continue, will render nugatory the Order of this Court dated August 1, 1974, retaining jurisdiction here.
- 7. As examples of the harassment to which the plaintiff Rostam is being submitted in the United States District Court action in Texas, in which Ennis is the plaintiff, I submit for the attention of this Court copies of communications and documents received from plaintiff Rostam's counsel in Texas, as follows:

Exhibit C (annexed hereto) - Demand under Rule
33 for written interrogatories "first set";

Exhibit D (annexed hereto) - A letter from plaintiff Rostam's counsel in Texas, concerning a delay in serving interrogatories;

Exhibit E (annexed hereto) - Letter from plaintiff
Rostam's counsel in Texas, indicating a non-jury trial
having been set for September 23, 1974;

Exhibit F (annexed hereto) - Letter from plaintiff
Rostam's counsel in mexas, dated August 26, 1974, enclosing

plaintiff's motion for sanctions;

Exhibit G (annexed hereto) -Copy of motion for sanctions in Texas action.

Exhibit II (annexed hereto) - Letter dated August 22, 1974, from plaintiff's Texas attorney referring to hearing on September 27, 1974.

apparently is unwilling to honor the Order of this Court and has by means of the action brought by it as an after-thought in Texas whipsawed this plaintiff, Rostam, by causing it to fight the action on two fronts although this court has indicated that the proper place for trial is in this jurisdiction. Judge Ward's next motion date is October 1, 1974, the defendant Ennis is making several applications to the U.S. District Court in Texas on September 27, 1974.

I therefore respectfully request that this court sign the annexed Order to Show Cause why an order should not be entered staying the defendant, Ennis Business Forms, Inc., from proceeding with the action in which it is plaintiff in the United States District Court for the Northern District of Texas Index #3-74-588-C and for such other and further relief as to this Court may deem appropriate under the circumstances. No previous application has been made for such relief.

s/Stanley M. Estrow

Sworn to September 18th, 1974 UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ROSTAM PUBLISHING CO.,

Plaintiff,

-against-

ENNIS BUSINESS FORMS, INC. (ENTEX PUBLICATION DIVISION),

Defendant.



This is a motion by defendant pursuant to 28 U.S.C. \$1404(a) to transfer this action to the Northern District of Texas and pursuant to Rule 12(b)(6), Fed. R. Civ. P., to dismiss the complaint on the ground that it fails to state a claim upon which relief can be granted in that it fails to set out adequately the purported agreements between the parties and to identify adequately whether the purported agreements were oral, written, or partly oral and partly written, or in the alternative, for an order requiring plaintiff to make a more definite statement of its purported claims. For the reasons hereinafter stated, defendant's motions are denied except as set forth below.

This is an action for breach of contract which plaintiff, a New York corporation, commenced in the Supreme Court of the State of New York by means of extraterritorial

service upon defendant, a Texas corporation. Defendant removed the action to this Court on February 25, 1974.

Plaintiff, a publisher of periodicals sold almost exclusively at newsstands, allegedly agreed with defendant which was engaged, inter alia, in printing, production, and shipping of periodicals, to print plaintiff's magazines. The complaint alleges that defendant breached its purported agreement to perform and also alleges fraud.

Section 1404(a) provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The criteria to be applied by the Court in exercising its discretion under \$1404(a) were set forth in Schneider v. Sears, 265 F. Supp. 257, 263 (S.D.N.Y. 1967):

"* * These include: (1) the convenience to parties; (2) the convenience of witnesses; (3) the relative ease of access to sources of proof; (4) the availability of process to compel attendance of unwilling witnesses; (5) the cost of obtaining willing witnesses; (6) the practical problems indicating where the case can be tried more expeditiously and inexpensively; and (7) the interests of justice, a term broad enough to cover the particular circumstances of each case, which in sum indicate that the administration of justice will be advanced by a transfer. [footnotes deleted]."

The plaintiff's choice of forum also remains a factor to be considered although it is no longer entitled to the great weight formerly given it under the doctrine of forum non conveniens. Schneider v. Sears, supra, at 266.

In considering the convenience of parties and witnesses,

"a determination of the location of the majority of material witnesses is of significant importance. Gallen v. Howard D. Johnson Co., 271 F. Supp. 680 (S.D.N.Y., 1967). As the court stated in Anthony v. RKO Radio Pictures, Inc., 103 F. Supp. 56, 57 (S.D.N.Y., 1951):

'In the determination of the question whether a transfer shall be ordered, a factor of considerable importance is the number of witnesses each party is likely to call who are capable of testifying as to determinative issues in the case.'" Fogel v. Wolfgang, 48 F.R.D. 286 (S.D.N.Y. 1969).

Defendant lists ten proposed witnesses. Of these, three are former executives of defendant who participated in various discussions with the plaintiff regarding matters dealt with in numerous paragraphs of the complaint. It appears that each would testify as to matters not within the scope of the testimony of the other two executives. Two of these former executives reside in Ennis, Texas and one lives in Menlo Park, California. Defendant also proposes to call five employees who were involved in the production phase of the printing and shipping of plaintiff's periodicals. Clearly in a suit alleging

breach of a performance contract, their testimony as to the various aspects of performance is crucial. Of these five proposed witnesses, only one is still an employee of defendant. Three others live in Ennis, Texas and one resides in Dallas, Texas. Finally, defendant indicates its intention to call as witnesses its credit manager who would testify as to payments made by plaintiff to defendant and the former head of accounting and billing for the former subsidiary involved in this dispute. The credit manager, presently an employee of defendant, resides in Ennis, Texas as does the former head of accounting and billing who is retired. In sum, of ten proposed witnesses on behalf of defendant, nine reside in the Northern District of Texas and one in California. Of the nine who reside in the Northern District , of Texas, only two are in the employ and subject to the control of defendant. Furthermore, it is apparent that at least for the seven non-employee witnesses who reside in Texas a trial there would be far more convenient than a trial in the Southern District of New York.

Moreover, relevant documents in defendant's custody or control, all of which are located in Ennis, Texas, appear to be voluminous; they occupy eight transfiles or sixteen feet of filing space.

In opposition plaintiff lists numerous proposed witnesses who live in the New York metropolitan area and who

are not subject to its control. According to plaintiff, a number of these proposed witnesses would testify to a survey undertaken by plaintiff's national distributor. Kable News Company, Inc., after the termination of the relationship between plaintiff and defendant, which was based on records maintained by selected wholesalers. In the Court's view, such evidence would be inadmissible hearsay. Plaintiff lists seven other proposed witnesses. Of these, one lives in Florida although the records as to which he would testify are in New York. The remaining proposed witnesses, all of whom reside in the New York metropolitan area and are subject to subpoena, appear able to testify as to determinative issues.

In viewing the convenience of parties and witnesses, the Court is of the opinion that so far as the presentation of live testimony is concerned transferring this action would merely shift the burden of inconvenience rather than making it more convenient to obtain live testimony. Since plaintiff's choice of forum remains a factor to be considered, the motion to transfer must be denied unless there are additional factors which indicate the desirability of a transfer.

Defendant argues that there are several such additional factors. As stated above, defendant's relevant documents, which occupy sixteen feet of filing space, are located number of documents required will be substantially reduced once the issues have been clearly framed in advance of the trial and the required documents could then be duplicated without undue burden.

Defendant also contends that a view of the premises where the contract was performed is essential to the effective presentation of its case on the issue of whether there were deficiencies in binding plaintiff's periodicals. Given the factual circumstances surrounding this case, the Court disagrees. The alleged breach occurred in 1971. A view of the plants at this time would not be relevant to the way they functioned three years ago, especially since defendant sold one of the plants involved in October, 1971 and the other in March, 1972.

Another factor to be considered is whether New York or Texas law governs since,

"[t]here is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947).

Under New York's grouping of contacts approach in the choice of law field, Texas law would appear to be applicable, since the gravamen of the complaint is defendant's alleged breach of its performance obligations. However, there has been no indication that Texas law differs from New York

law concerning the matters at issue.

Defendant's argument in flavor of transfer to
the Northern District of Texas because of related litigation
there is unpersuasive. The pending litigation in Texas
between the parties was commenced subsequent to the instant
action and should not be accorded weight. The prior litigation even if related is no longer pending so that there
would not be the judicial economy which occurs when related
cases are tried together.

After reviewing all of the criteria, the Court concludes that defendant's motion to transfer must be denied.

That portion of defendant's motion which seeks to dismiss the complaint is denied. A claim "should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." 2A

J. Moore, Federal Practice, \$12.08, at 2271-74 (2d ed. 1972) and cases cited therein (emphasis in original). Plaintiff is, however, directed within twenty days of the date of this decision to furnish defendant with copies of all contracts which it alleges were breached or, if the contracts were oral to set forth their terms.

It is so ordered.

Dated: August 1, 1974



MAY 201974

85-37899

STATE OF TEXAS OFFICE OF THE SECRETARY OF STATE AUSTIN, TEXAS 78711

Mark W. White, Jr.

May 17, 1974

Bruce Hughes ASST SECRETARY OF STATE

Rostam Publishing, Inc. 555 Fifth Avenue New York, New York

Ennis Business Forms, Inc. Vs. Rostam Publishing, Inc. in the F-116th Jud. Dist. Court of Dallas County, Cause Number 74-1356-F.

Dear Sir:

Pursuant to the Laws of Texas, we forward herewith by Certified Mail, return receipt requested, a copy of process (xxx) served, () delivered, to the Secretary of State of the State of Texas on May 17, 1974.

Very truly yours,

MARK W. WHITE, JR. Secretary of State

MWW:lv

Enclosure

CC: Mr. Ralph E. Hartman Attorney at Law 43rd Floor, First National Bank Bldg. Dallas, Texas 75202

Exhibit

PLAINTIFF'S ORIGINAL PETITION

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SAME TITLE

TO SAID HONORABLE COURT:

NOW COMES Ennis Business Forms, Inc., hereinafter called Plaintiff, complaining of Rostam Publishing, Inc., hereinafter called Defendant, and for cause of action shows to the Court and jury the following:

I.

Plaintiff is a Texas corporation. Defendant is a foreign corporation, doing business within the State of Texas, including entering into contracts to be performed within this state, without a designated agent for service or a designated place of business, and it is therefore amenable to process under the provisions of Article 2031b of the Texas Revised Civil Statutes. Such Defendant corporation maintains an office and place of business at New York, New York, and its mailing address is 555 Fifth Avenue. Citation may be served on Defendant by delivery of process upon the Secretary of State of the State of Texas.

II.

This is a liquidated money demand on which a systematic record has been kept arising out of business dealings between the Plaintiff and Defendant and is an account covering certain goods, wares, merchandise,

materials and services, which Plaintiff, at the special instance and request of Defendant, sold, delivered, furnished and rendered to the Defendant and in consideration whereof the Defendant then and there promised and agreed to pay Plaintiff the sum of money charged thereupon upon the terms of said account; and that said goods, wares, merchandise, materials and services were at the time of the sale, delivery and furnishing and rendition thereof reasonably worth the sum of \$21,798.00.

III.

That after the allowance of all just and lawful offsets, payments and credits to the Defendant, that the balance thereof of \$21,798.00 is past due and unpaid, and the Defendant, though often requested, has heretofore failed and refused and still refuses to pay same or any part thereof.

IV.

Plaintiff further alleges that this is a suit founded upon a sworn account or accounts; that demand has been made upon the Defendant for payment more than thirty (30) days prior to the filing of this suit; that Plaintiff has employed the firm of Jackson, Walker, Winstead, Cantwell & Miller, attorneys duly licensed to practice before the Supreme Court of Texas and has agreed to pay these attorneys a reasonable sum for the handling of this cause of action in the trial court, which is

alleged to be \$5,000.00, and an additional reasonable sum for the handling of this cause on any appeal, all of which is reasonable in amount and for which the Defendant is liable in accordance with the provisions of Article 2226, Revised Civil Statutes of the State of Texas, as amended.

v.

of the factory work orders and account billing reflecting the above described account.

WHEREFORE, PREMISES CONSIDERED, your Plaintiff prays that the Defendant be cited to appear and answer this Petition, and that Plaintiff have judgment against the Defendant for its debt in the sum of \$21,798.00, reasonable attorneys' fees in the sum of at least \$5,000.00, interest at the rate of 6% per annum, reasonable attorneys' fees on any appeal, and all costs of suit and other relief in law and in equity to which entitled.

JACKSON, WALKER, WINSTEAD, CANTWELL & MILLER 4300 First National Bank Bldg. Dallas, Texas 75202

[Verified by Nelson D. Ward]

Sworn to February 14th, 1974 Bv:

Ralph E. Hartman Attorneys for Plaintiff

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THE STATE OF TEXAS

RECEIVED

ROSTAM PUBLISHING & INC. defendant

(By serving Secretary of State, State of TExas, Austin, Texas)

ENNIS BUSINES

CIT

No.

You the said defandant are hereby commanded to appear by filing as written answer to the plaintiff's petition at or before 10 o'clock A.M. of the Monday next after the expiration of 20 days after the date of service hereof before the lifeth Judicial District Court of Texas, at the Courthouse in the City of Dallas, Dallas County, Texas, said plaintiff being

ROSTAM PUBLISH

This . 14 . day o

Clerk, District Co Dallas County, To

By.....Phy111:

RALPH E. HA 4300 First Dallas

BILL SHAW,

ENNIS BUSINESS FORMS, INC.

Filed in said Court on the ... 15 day of ... FEB 19 74 against

ROSTAM PUBLISHING , INC.

For suit, said suit being numbered.....74-1356-F....., the nature of which demand is as follows:

SUIT ON SWORN ACCOUNT ETC.

as shown on said petition, a copy of which accompanies this citation.

If this citation is not served within 90 days after date of its issuance, it shall be returned unexecuted.

Atty ... for P

Delivered this

ATTEST: BILL SHAW

Clerk of the District Courts of Dallas County, Texas

Phyllis Hinton Deput

By Gh

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TATION

...74-1356-F

S FORMS, INC.

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. Binton..... Deputy

RTMAN Natl. Bank Bldg. 75202

PLAINTIFF'S RULE 33 WRITTEN INTERROGATORIES FIRST SET

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SAME TITLE

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Pursuant to the Federal Rules of Civil Procedure, including Rule 33, Plaintiff, Ennis Business Forms, Inc., hereby submits its Interrogatories to Defendant, (first set) and requests their answer, with supplementation, all as prescribed by the Federal Rules of Civil Procedure:

DEFINITIONS

- 1. "Identify" when used in reference to an individual person or firm means to state the full name and last known address. In reference to an individual person it also means to state the person's last known business position. "Identify" when used in reference to a document means to state the author, date, type of document (e.g., letter, memorandum, telegram, chart, etc.), its present location and custodian, and any other means of identifying it.
- 2. "Document" is intended to mean any written, printed, typed or other graphic matter of any kind or nature, and all mechanical and electronic sound recordings or transcripts thereof, in the possession or control of Plaintiffs or their officers, employees, or agents or known by Defendants to exist; it also mean all

copies of documents by whatever means made.

INTERROGATORIES

- State the correct name, address, state of incorporation and principal place of business of the Defendant.
 - 2. Identify the officers of the Defendant.
- Identify all persons consulted in connection
 with your answers to these interrogatories.
- 4. Has Defendant ever contracted with Plaintiff for the printing of publications in the State of Texas by Plaintiff? If so, identify each publication, the date of the publication printed by Plaintiff and the place of printing.
- 5. Did Plaintiff print issues of the following named periodicals at the instance of Defendant at its printing plant in Texas:
 - A. August, 1971, "Real Detective";
 - B. August, 1971, "Police Detective";
 - C. August, 1971, "Adventure for Men".
- 6. Identify all documents in the possession of Defendant in connection with the printing of any of the magazines inquired about in the preceding interrogatory. It is acceptable that the Defendant attach copies of such documents as its answer to this interrogatory.

- 7. Do the invoices attached to Plaintiff's
 Original Petition correctly state the unit price, magazine
 description and total contract price of each magazine?
 If not, state in detail why any part of the invoice is
 not correct.
- 8. Has the Defendant paid in whole or in part any of the invoices attached to the Plaintiff's Petition?
- 9. Did Defendant cause to be filed in the Supreme Court of the State of New York, County of New York, its Verified Complaint in Rostam Publishing Co., Inc., Plaintiff, against Ennis Business Forms, Inc. (Entex Publication Division), Defendant? If so, then state the following:
- A. In the fourth paragraph of page one the printing, production and shipping facilities of Ennis Business Forms, Inc. are described as being in Texas. Where does Defendant contend that the Plaintiff printed, produced and shipped the August, 1971, "Real Detective", "Police Detective", and "Adventure for Men"?
- B. Attached to the Verified Complaint is

 Exhibit A consisting of three pages and purporting to be
 a written proposal accepted by Rostam Publishing, Inc.

 Where do you contend that the printing required by the
 proposal was performed?
- C. In paragraph 27 you allege that certain

 August, 1971 issues of "Police Detective", "Real Detective"

and "Adventure for Men" were not timely shipped? Where were such issues printed and from where were they shipped and state the scheduled date and place of shipment.

(In answering this interrogatory, Defendant may wish to make recourse to paragraph 23 of the Verified Complaint).

Respectfully submitted,

JACKSON, WALKER, WINSTEAD, CANTWELL & MILLER 4300 First National Bank Bldg. Dallas, Texas 75202

By s/Ralph E. Hartman RALPH E. HARTMAN Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing plaintiff's Rule 33 Written Interrogatories - First Set, was sent by certified mail, return receipt requested, to George G. Potts, 2300 Republic National Bank Tower, Dallas, Texas, 75201, attorney for Defendant, This 21st day of July, 1974.

s/Ralph E. Hartman
RALPH E. HARTMAN

GOLDEN, POTTS, BOECKMAN & WILSON

ATTORNEYS AT LAW

2300 REPUBLIC NATIONAL BANK TOWER

DALLAS, TEXAS 75201

HAWKINS GOLDEN
GEO. GARRISON POTTS
DUNCAN BOECKMAN
CLAUDE R. WILSON, JR.
YENGER HILL, III.
H. DAVID HERNDON
TERRY A. YATES

August 14, 1974

TELEPHONE AREA CODE 214 742: 8422

Mr. Stanley M. Estrow Attorney at Law 529 Fifth Avenue New York, New York 10017

Re: Ennis Business Forms, Inc. vs. Rostam Publishing, Inc.

Dear Mr. Estrow:

This is to advise you that the attorney for Ennis has written us a letter with a copy to the Court complaining of the delay in receiving answers to his interrogatories.

Yours truly,

Savid Herndon

DH/nh

EXHIBIT & D

30

GOLDEN, POTTS, BOECKMAN & WILSON ATTORNEYS AT LAW

2300 REPUBLIC NATIONAL BANK TOWER

DALLAS, TEXAS 15201

HAWRINS GOLDEN
GEO. GARRISON POTTS
DUNCAN BOECKMAN
CLAUDE F. WILSON, JR.
/FRGER HILL, JT.
II DAVID HENHIDON
IERRY A YATES

August 21, 1974

TELEPHONE AREA CODE 214 142 8422

Mr. Stanley M. Estrow Attorney at Law 529 Fifth Avenue New rork, New York 10017

Re: Ennis Business Forms, Inc. vs. Rostam
Publishing, Inc.

Dear Mr. Estrow:

This is to advise you that this case has now been set for non jury trial on September 23, 1974 at 9:00 A.M.

Yours truly,

David Herndon

DH:jh

GOLDEN, POTTS, BOECKMAN & WILSON

ATTORNEYS AT LAW

2300 REPUBLIC NATIONAL BANK TOWER

DALLAS, TEXAS 75201

HAWKINS GOLDEN
GEO. GARRISON POTTS
DUNCAN BOECKMAN
CLAUDE R. WILSON, JR.
YERGER HILL, III
H. DAVID HERNDON
TERRY A. YATES

August 26, 1974

TF_EPHONE AREA CODE 214 742-8422

Mr. Stanley M. Estrow Attorney at Law 529 Fifth Avenue New York, New York 10017

Re: Ennis Business Forms, Inc. v. Rostam Publishing, Inc.

Dear Mr. Estrow:

Enclosed please find a copy of the Plaintiff's Motion for Sanctions. It is our opinion that we have to answer these Interrogatories and should do so as promptly as possible.

Yours truly,

David Herndon

DH/nh Enclosure

EXHIBIT EF

EXHIBIT "G"
MOTION FOR SANCTIONS

---- X

SAME TITLE

----x

TO SAID HONORABLE COURT:

Under date of July 3, 1974, Rule 33 Interrogatories were filed and addressed to Defendant. The

Interrogatories, nine in number, required the Defendant
to identify a Complaint filed by it in the Supreme Court
of the State of New York and to identify its officers and
printing contracts with the Plaintiff. None of the
Interrogatories required any extensive research and
were easily answerable. To date none of the Interrogatories
have been answered and sanction should be applied against
the Defendant striking its pleadings, taxing reasonable
attorneys' fees for the benefit of the undersigned who
has been required to expend time and effort to secure
compliance with the Rules and other and further relief.

Respectfully submitted,

JACKSON, WALKER, WINSTEAD, CANTWELL & MILLER 4300 First National Bank Bldg. Dallas, Texas 75202

By s/Ralph E. Hartman
RALPH E. HARTMAN
Attorneys for Plaintiff

33 GOLDEN, POTTS, BOECKMAN & WILSON ATTORNEYS AT LAW 2300 REPUBLIC NATIONAL BANK TOWER HAWKINS GOLDEN DALLAS, TEXAS 75201 GEO. GARRISON POTTS TELEPHONE CLAUDE A. WILSON, JR. YERGER FILL, TII H. DAVID HERNDON TERRY A. YATES August 22, 1974 AREA CODE 214 742-8422 Mr. Stanley M. Estrow Attorney at Law 529 Fifth Avenue New York, New York 10017 Ennis Business Forms, Inc. vs. Rostam Publishing, Inc. Dear Mr. Estrow: This is to advise you that this case is not set for trial on September 23, 1974, but is set for hearing on our plea to the jurisdiction on September 27, 1974. The Plaintiff's attorney has just advised us that in a few days he will file a motion to strike our plea to the jurisdiction and perhaps also our answer when it is filed for our failure to answer his interrogatories. GOLDEN, POTTS, BOECKMAN & WILSON GP:jc Exhibit H

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

ROSTAM PUBLISHING, INC.,

Plaintiff,

-against-

VERIFIED COMPLAINT

ENNIS BUSINESS FORMS, INC. (ENTEX PUBLICATION DIVISION),

Defendant.

Plaintiff, complaining of defendant herein, by its attorney, Stanley M. Estrow, respectfully alleges:

AS AND FOR A FIRST CAUSE OF ACTION:

FIRST. That at all times hereinafter mentioned, plaintiff was and still is a New York corporation, having its principal place of business in the Borough of Manhattan, County, City and State of New York.

SECOND. That at all times hereinafter mentioned, plaintiff was and still is in the business of publishing periodicals intended for sale upon newsstands throughout the world.

THIRD. That upon information and belief, at all times hereinafter mentioned, defendant was and still is a foreign corporation having its principal place of business in Ennis, Texas.

FOURTH. That upon information and belief, at all times hereinafter mentioned, defendant operated manufacturing

facilities for the printing, production and shipping of periodicals, both in Ennis, Texas (ENTEX PUBLICATION DIVISION), and in Dallas, Texas (STORM PRINTING COMPANY DIVISION).

FIFTH. That heretofore and at all times hereinafter mentioned, plaintiff was the publisher of periodicals entitled: THE WRESTLER, WORLD BOXING, BOXING ANNUAL, INSIDE WRESTLING, POLICE DETECTIVE, POLICE DETECTIVE YEARBOOK, MEN IN ADVENTURE, MEN IN ADVENTURE YEARBOOK, INTERNATIONAL BOXING, ADVENTURE FOR MEN, ADVENTURE FOR MEN YEARBOOK, REAL DETECTIVE, REAL DETECTIVE YEARBOOK, HOW TO DATE AND MATE THROUGH ASTROLOGY, ACTION SPORTS BASEBALL YEARBOOK and ACTION SPORTS BASEBALL GUIDEBOOK.

December, 1969, plaintiff, through its dulyauthorized officer, received a written proposal from defendant for the production of plaintiff's publications which was accepted by plaintiff at its office in New York City, under date of January 16, 1970, marked Exhibit "A". Subsequent thereto, said agreement was further modified by memoranda from defendant increasing printing prices on certain of plaintiff's publications under dates of May 21, 1970, marked Exhibit "B", and June 2, 1970, marked Exhibit "C".

SEVENTH. That pursuant to said proposal and modification, defendant undertook to perform the manufacturing operations required in a good and workmanlike manner and to produce said publications in accordance with a time schedule to be agreed upon between the parties.

EIGHTH. That at all times hereinafter mentioned, plaintiff duly performed all the terms and conditions required by said agreement and modifications thereof on the part of plaintiff herein.

NTNTH. That heretofore, plaintiff prepared and delivered to defendant for production, as aforesaid, the August, '1970, February, 1971 and August, 1971 editions of POLICE DETECTIVE, the January, 1971 edition of REAL DETECTIVE, pursuant to the agreement as aforesaid.

TENTH. That defendant neglected and failed to properly perform the manufacturing processes as provided for in the agreement between the parties, in that in the course of manufacturing said two issues, defendant failed to include and incorporate numerous pages of editorial material previously supplied by plaintiff to defendant and caused said issues to be shipped to the retail newsdealers with said sections missing, resulting in said issues being offered to the public in an incomplete and unsalable condition.

ELEVENTH. That plaintiff paid defendant the sum of \$30,996.28 for said four issues.

TWELFTH. That by reason of the premises as aforesaid, defendant breached its contract with plaintiff in producing said issues in that the same were not produced in a good and workmanlike manner and plaintiff was caused to and did expend the sum of \$17,597.92 therefor, all to its damage in said sum, together with a loss of good will on the part of purchasers,

who, having purchased said editions, would have failed and refused to purchase subsequent editions by reason of such defects.

AS AND FOR A SECOND CAUSE OF ACTION:

THIRTEENTH. Plaintiff repeats and realleges each and every allegation contained in Paragraph "FIRST" through "EIGHTH" hereof, with the same force and effect as though set forth at length herein.

FOURTEENTH. That in entering into the agreement with defendant for the production of the publications as aforesaid, plaintiff made known to defendant and defendant acknowledged to plaintiff that the publications to be manufactured by defendant for plaintiff were intended for newsstand sale and distribution and that the production would be scheduled to provide for shipments to the various wholesale and retail dealers in said publications on a basis consistent with the frequency of publications of the particular periodical, either on a monthly, bi-monthly, quarterly or annual frequency; that in accordance with said understanding, agreement and arrangement, plaintiff and defendant entered into a schedule of production setting forth the various dates for the commencement of production and the dates for completion of shipments for the individual issues of each of the periodicals published by plaintiff herein, which schedule defendant agreed to comply with.

FIFTEENTH. That in entering into the agreement with plaintiff, defendant was informed by plaintiff that the production dates were consistent with and pursuant to arrangements by plaintiff with its national distributor, Kable News Company,

which company in turn had arranged the distribution schedule for plaintiff's periodicals to conform with and coincide with distributing procedures in the trade generally with the ultimate object of having plaintiff's periodicals arrive at the various wholesalers and retailers on a predetermined schedule and in time for distribution to the retail newsstands on or before a given "on sale date."

SIXTEENTH. That in addition to the arrangements made by plaintiff with Kable News Company, as aforesaid, plaintiff advised defendant that the aforementioned schedule provided for maximum exposure for plaintiff's titles for the frequency of publication referred to above so that a monthly publication would receive a 30-day exposure; a bi-monthly publication would receive a 60-day exposure; a quarterly publication would receive a 90-day exposure; etc., and that the cover dates for the various publicstions would therefore be advanced sufficiently to provide the exposure as aforesaid on newsstands at the same time as competitive publications produced by other publishers and bearing the same cover dates would be on said newsstands and offered for sale, and any interruption or delay in the production and shipping as called for by the schedule would result in reduced sales periods for plaintiff's periodicals.

SEVENTEENTH. That in addition the foregoing, plaintiff advised defendant that advertising would be solicited from advertisers for publication in plaintiff's periodicals with the advertising schedules coinciding with the on sale dates

anticipated and provided for by plaintiff's arrangements with
Kable News Company, its distributor as aforesaid, and defendant,
the printer of plaintiff's periodicals, as aforesaid, and
plaintiff further advised defendant that any interference with
the schedule would result in advertiser's appearing on
newsstands at times or period other than select and predetermined
by advertisers which would result in either advertiser's refusal
to pay for the advertising, or by reason of the failure to
receive the anticipated results, would refuse to continue to
advertise in plaintiff's publications.

publications, as aforesaid, developed a cash flow for its anticipated income and for additional financing based on the frequency and continuity as provided in the schedule of production arranged between plaintiff and defendant herein and defendant was so advised by plaintiff; defendant entered upon the production of plaintiff's periodicals with full knowledge of the need for prompt and consistent performance, and that time was of the essence, and that plaintiff's publishing stability and cash flow was dependent upon prompt performance by defendant herein.

NINETEENTH. That upon information and belief, between the period of October 1, 1970 and June 30, 1971 defendant, without knowledge thereof upon the part of plaintiff, caused plaintiff's periodicals to be shippedto the wholesale and retail newsdealers some ten day to thirty days later than the scheduled completion dates and caused to be issued to plaintiff and to

plaintiff's national distributor, Kable News Company, erroreous, misleading and untrue completion cards; that lacking information to the effect that defendant was wilfully concealing and misrepresenting the completion dates as aforesaid, plaintiff was unable to take any steps to rearrange on sale dates with the wholesalers and retailers, to redate upcoming issues, to reschedule advertising and "on-sale date", to rearrange financing, and in addition, plaintiff's periodicals were caused to be placed on sale during the time periods which were disadvantageous to plaintiff in that competitor's publications bearing the same cover dates had then completed their periods of sale or had been withdrawn from sale and plaintiff's periodicals appeared on sale after the normal sales period, and by reason of such cover dates, appeared to be out of date from the viewpoint of retail purchasers based on the practices and procedures adopted by competitive publishers and plaintiff herein for the dating of such publications.

TWENTIETH. That by reason of the deception, misrepresentation and fraud of defendant in issuing said completion cards as aforesaid, plaintiff has been damaged in the sum of \$410,592.29.

AS AND FOR A THIRD CAUSE OF ACTION:

TWENTY-FIRST. Plaintiff repeats and realleges each and every allegation contained in Paragraph "FIRST" through "EIGHTH" hereof with the same force and effect as though set forth at length herein.

TWENTY-SECOND. That heretofore and in or about the months of March and April, 1971, plaintiff, in accordance with the previously arranged production schedules, provided defendant with all of the editorial material, advertising copy and shipping galleys for plaintiff's periodicals, i.e., ADVENTURE FOR MEN YEARBOOK NO. 6, INSIDE WRESTLING, JULY 1971, WORLD BOXING, JULY 1971, THE WRESTLER, JULY 1971, POLICE DETECTIVE, AUGUST 1971, REAL DETECTIVE, AUGUST 1971, and ADVENTURE FOR MEN, AUGUST 1971.

TWENTY-THIRD. That at or about the time that said material was issued to defendant for production as aforesaid, defendant advised plaintiff that its printing plant in Ennis, Texas was having certain labor problems but that there would be no interruption or interference with the production of plaintiff's periodicals since defendant would be employing the facilities of its printing plant in Dallas, Texas (STORM PRINTING CO.), and would be completing the binding and shipping by the use of their executive and other supervisory personnel at their plant in Ennis, Texas.

TWENTY-FOURTH. That defendant reported to plaintiff that INSIDE WRESTLING, JULY 1971, WORLD BOXING, JULY 1971 and THE WRESTLER, JULY 1971, had completed shipments on May 18, 1971, substantially later than scheduled, whereas in truth and in fact, said shipments were improperly labeled and their cover dates were unsuitable for newsstand distribution at that late date; that said issues were destroyed. ADVENTURE FOR MEN YEARBOOK NO. 6 had been included in the improperly labeled shipments which had been recalled and was also destroyed. In addition, defendant advised

plaintiff that POLICE DETECTIVE, AUGUST 1971, REAL DETECTIVE,
AUGUST 1971, ADVENTURE FOR MEN, AUGUST 1971, which had been
scheduled for completion on May 17, 1971, had been shipped
completely by May 24, 1971, whereas in truth and in fact, said
information was false, fraudulent and misleading in that shipping
was not completed until June 11, 1971.

TWENTY-FIFTH. That on or about May 25, 1971, defendant advised plaintiff that it would not be able to print subsequent editions of plaintiff's periodicals despite its assurances that the strike as aforesaid would not interfere with their production; that at the time of the receipt of such information from defendant, plaintiff had submitted to defendant additional editorial material for subsequent editions of its periodicals, much of which had time value in that unless it appeared on sale to the reading public at the time scheduled by plaintiff, the information would be of little or no value to the public and would result in the diminution in value of plaintiff's periodicals to the purchaser, thereby reducing or eliminating the possibility of selling the same on the newsstands because the material would be dated and of no value to the purchaser.

TWENTY-SIXTH. That by reason of defendant's failure to produce and timely ship INSIDE WRESTLING, JULY 1971, WORLD BOXING, JULY 1971 and THE WRESTLER, JULY 1971, plaintiff suffered damage in that all of the editorial expense in preparing photographs and editorial material, typesetting, camera work, advertising and newsstand income was lost to plaintiff, together with the loss of good will in that the continuity of the

appearance of plaintiff's publications on the newsstands was seriously interfered with.

TWENTY-SEVENTH. That by reason of the delay in shipping the August 1971 issues of POLICE DETECTIVE, REAL DETECTIVE, ADVENTURE FOR MEN, by three (3) weeks or more beyond the scheduled date, said periodicals, in many cases, were not placed on sale by the wholesale and retail news dealers and were returned unsold to plaintiff's national distributor and to plaintiff herein, resulting in a loss of newsstand income, shipping expense, editorial expense and overhead expense, in addition to the loss of good will on the part of its regular purchasers.

TWENTY-EIGHTH. That by reason of the premises, plaintiff was damaged in the sum of \$11,698.63.

AS AND FOR A FOURTH CAUSE OF ACTION:

TWENTY-NINTH. Plaintiff repeats and realleges each and every allegation contained in Paragraph/FIRST" through "EIGHTH" AND "FOURTEENTH" through "EIGHTEENTH" hereof, with the same force and effect as though set forth at length herein.

THIRTIETH. That upon receipt of the information from defendant on or about May 24, 1971, that defendant was unable to continue with the production of plaintiff's periodicals pursuant to contract, plaintiff found itself without princing facilities and was caused to seek other sources for the manufacturing of plaintiff's periodicals.

THIRTY-FIRST. That thereafter and on or about the 21st day of June, 1971, plaintiff secured other printing facilities for the production of plaintiff's periodicals.

THIRTY-SECOND. That by reason of the action of defendant in cancelling its agreement with plaintiff, as aforesaid, plaintiff was unable to produce the following issues of plaintiff's periodicals, resulting in a loss of continuity, loss in seles, loss in advertising income and loss of cash flow:

THIRTY-THIRD. That by reason of the breach of contract, as aforesaid, by defendant, plaintiff was damaged in the sum of \$26,000.00.

AS AND FOR A FIFTH CAUSE OF ACTION:

THIRTY-FOURTH. Plaintiff repeats and realleges paragraphs "FIRST" through "EIGHTH" and "FOURTEENTH" through "NINE-TEENTH" hereof, with the same force and effect as though set forth at length herein.

THIRTY-FIFTH. That by reason of the failure of the defendant to perform said contract, and to produce and ship plaintiff's publication at the times agreed upon, and by the various methods of transportation theretofore agreed upon, the on-sale periods of plaintiff's publication were seriously and adversely affected, in that their sales periods were shortened, and made non-competitive with similar publications offered to the

buying public at the retail newsstands.

THIRTY-SIXTH. That by reason of the breach of contract, as aforesaid, plaintiff's sales of its publications were reduced by an amount equal to 15% of the gross distribution, on all issues of plaintiff's periodicals printed and shipped by the defendant, such 15% loss in sales of gross distribution representing in total the sum of \$418,160.53, which additional sum plaintiff would have and should have received from the newsstand sale, had the defendant performed the printing and shipping of plaintiff's publications, in the manner and at the times agreed upon.

THIRTY-SEVENTH. That plaintiff has been damaged in the sum of \$418,160.53.

AS AND FOR A SIXTH CAUSE OF ACTION:

THIRTY-EIGHTH. Plaintiff repeats and realleges paragraphs "FIRST" through "EIGHTH" and "FOURTEENTH", "FIFTEENTH" and "NINETEENTH" hereof, with the same force and effect as though set forth at length herein.

THIRTY-NINTH. That in addition to the failure to properly produce and timely ship plaintiff's periodicals, as aforesaid, plaintiff has now been advised and billed by its national distributor, Kable News Company, for shortages in shipments to various wholesale newsdealers covering the period as aforesaid.

FORTIETH. That under date of September 29, 1973, the plaintiff was billed the sum of \$1,716.03 for the shortages in shipments, as aforesaid.

FORTY-FIRST. That the plaintiff has been damages in the sum of \$1,716.03.

WHEREFORE, plaintiff demands judgment against defendant:

On the First Cause of Action in the sum of \$20,000.00;

On the Second Cause of Action in the sum of \$410,592.29;

On the Third Cause of Action in the sum of \$11,698.63;

On the Fourth Cause of Action in the sum of \$26,000.00;

On the Fifth Cause of Action in the sum of \$418,160.33;

On the Sixth Cause of Action in the sum of \$1,716.03;

together with appropriate interest, costs and disbursements.

Yours, etc.

STANLEY M. ESTROW, ESQ. Attorney for Plaintiff Office and P.O. Address 529 Fifth Avenue New York, New York 10017 (212) 986-9345

SIGHED- 1/16/70



Division of ENNIS BUSINESS FORMS, INC.

214 West Knox Street Ennis, Texas 75119

Is Pleased to Present This

PROPOSAL

For Supplying the Work Described in Accordance with Specifications and at Prices Indicated.

Major Printed Media Division Ennis Business Forms, Inc. DATE: 12-22-69

Re our Est. #

FOR: Rostan Publishing Company
Ext 1374

New York, New York 10022

General Description:

80-page megasine format for Advanture & Detective series.

Quantity:

150,000

Paper:

32# Nave - 704 cover

Ink or Color:

Cover - 4-1-1--6 - Text B/W

Other Material:

Mone

Composition:

Publisher to furnish page positives

Binding:

Perfect Bound

Other Finishing:

Nono

Imprints:

Bono

Other Specifications:

Mono

Shipping:

F.O.B. Ennis Kable Galley \$3.50 per cut

Price:

80-page - \$8,550.00 - Additional H's - \$51.50/H - 57.50/H

\$8.122.00 for 72-page formst MOA. 603 - 6'M LencistonA

ONLY COPY AVAILABLE

TERMS: Audition of Boreno Cablo River

ENNIS shall have the right at any time to revise the stated credit terms or to withhold deliveries if ENNIS in its sole discretion deems such action necessary or advisable to protect its interest.

QUANTITY: ENNIS to Guarantee + or -- 3% of Quantity Ordered.

ESTIMATES — All estimates based on visuals, rough dummies, etc., whether accompanied by verbal or written specifications, shall be only tentative. Estimates are subject to revision upon inspection of finished copy.

ORDERS — If either party to the contract wishes to cancel the contract, ninety (90) days notice must be given in writing.

ALTERATIONS — Estimates are only for work produced according to the original specifications. If, either through customer's error or change of mind, work has to be done a second time or more, such extra work will carry an additional charge at prevailing rates for work performed.

CUSTOMER'S PROPERTY — All customer's property that is stored with ENNIS is at the customer's risk,—and ENNIS is not liable for any loss or damage thereto caused by acts not insurable or beyond our control. It is the customer's obligation to carry any insurance he may deem necessary to cover any loss.

DELIVERY — All estimates are based on continuous and uninterrupted delivery of complete order unless specifications distinctly state otherwise.

OVERTIME — Unless otherwise agreed, it is understood that the work will be performed during our regular working hours of our regular working days. If overtime is mutually agreed upon and performed, an additional charge therefor at our current rates for such work, shall be added to the contract price.

PRESS PROOFS — An extra charge will be made for press proofs unless the customer is present when the form is made ready on press so that no time is lost. Press standing time awaiting customer's OK will be charged for at regular production hour rates.

ESCALATOR CLAUSE — Any increase in labor or material rates will be reimbursed to the printer if said increases add to the cost of production of the contract. We shall not be liable for any loss, damage, or delay caused by strikes, lockouts, fire, explosion, transportation, theft, floods, riots, civil commotion, war, malicious mischief, act of God, or by any cause beyond our control, and in any event we shall not be liable for consequential damages.

We accept your proposal as outlined herein and agree to terms indicated.

Art Work to Be Delivered on Da	te:	
Required Delivery Date:		
Shipping/Mailing Instructions:	1.13 11/2/2	-
Date:///@//	Millett I telle ke	
∀• .		

(Please sign & return this copy in envelope provided)



Ennis, Texas 75119

May 21, 1970

Mr. Stanley Weston 117 Intervale Rockville Centre, New York 11570

Dear Stanley:

I am very sorry that I missed the opportunity to meet you last week. Between here and American Airlines, I had a frustrating two days. However, I was glad to have the opportunity to meet Bob. During our discussions with Bob Thursday, I brought up an item that I know should really have been discussed with you. It involves price increases on BOXING AND WRESTLING.

Since we originally began printing this magazine sometime back, we have continued to charge \$47.50/M on all copies up to 150,000. Since the time the original contract was made, we have had at least two labor increases which amounted to approximately 6% a piece, three newsprint increases and we have been warned of a possible further increase on newsprints this coming July. As a result of the combination of the last paper increase and wage increase, BOXING and WRESTLING is now in the red each month. As a result, I am faced to ask for an increase from \$47.50 to \$52.65/M effective with the August issue. By that, I mean that our dated August 1970 issue.

I realize this is a considerable jump, but I think you will also see from what I just stated that the profit we have been making has eroded away and as I showed Bob Stampleman the last cost sheets, we incurred a \$400.00 loss on each publication. Price increases are never pleasant, but in this day in age, they seem to be unavoidable.

I would appreciate confirmation by return mail.

Very truly yours,

Ralph Lepthien, Vice President

RLich



Ennis, Texas 75119

June 2, 1970

Rostam Publishing, Inc. Box 1374 New York, New York 10022

Attention: Mr. Bob Stampleman

Dear Bob:

In reference to our conversation yesterday, Ralph's letter and the price increase on the 64-page format, your increase would take effect in August. Therefore, I would assume if we are now printing August issues, the price increase would be in effect with the October issues which would be printed in August.

As we told you in New York, we have already reviewed our cost on this and we are not coming out. Plus we are anticipating another newsprint increase shortly.

Very truly yours,

Robert L. Gleason

RLG:ch

united Souther	STATES EN DISTI	DISTRI	CT COUR	T RK
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*****	perp 1 TQ1	THE CO		

Plaintiff.

BILL OF PARTICULARS

-against-

EMNIS BUSINESS FORMS, INC. (ENTER PUBLICATION DIVISION),

Defendant.

Plaintiff, pursuant to the order of Judge Robert J. Ward, dated August 1, 1974, as and for a bill of particulars as to the contractual relationship between the parties alleges:

- 1. The contract annexed to the complaint as Exhibit"A", and dated December 22, 1969, effective as of January 16, 1970, set forth prices, specifications and other terms for what defendant characterized 48 the Adventure and Detective series. The titles included in chese categories were:
 - A. Police Detective
 - Police Detective Annual
 - C. Real Detective
 - D. Real Detective Annual
 - Men in Adventure E.
 - Men in Adventure Yearbook
 - Adventure for Men
 - Adventure for Men Yearbook

All of the foregoing consisted of 80 pages and conformed to the specifications shown in Exhibit "A" annexed to the complaint.

- 2. The defendant printed additional titles for the plaintiff under the general heading of Boxing and Wrestling as follows:
 - A. World Boxing
 - B. Boxing Illustrated
 - C. The Wrestler
 - D. Inside Wrestling
 - E. Boxing Annuals or Yearbooks
 - F. Wrestling Annuals or Yearbooks

The plaintiff, Rostam, in a joint publishing venture with G. P. London Publishing Company, Inc. (Stanley Weston, principal) undertook the printing and distribution of said titles which the defendant Ennis had theretofore printed for Jalart House, Inc. This was confirmed by defendant Ennis by its letter dated August 26, 1969, Exhibit "A" annexed hereto. Confirmation and acceptance of that arrangement from plaintiff Stanley Weston is set forth in Exhibit "B" annexed hereto.

- 3. With respect to the following titles:
 - A. How to Date and Mate Through Astrology
 - B. Action Sports Baseball Yearbook
 - C. Action Sports Baseball Guidebook

There were no separate contracts. The defendant, through its Vice President, Ralph Lepthien, agreed to print said titles under the same specifications and under the same prices and terms then prevailing for the Adventure and Detective series.

Dated: September 4, 1974 New York, New York

ROSTAM PUBLISHING CO.



Ennis, Texas 75119

Major Printed Media Division

August 26, 1969

Mr. Stanley Weston 117 Intervale Rockville Centre, New York 11570

Dear Staniey:

To confirm our telephone conversation this morning, we will be pleased to continue printing BOXING and WRESTLING each month for your new enterprise.

We wil' maintain our print prices as we have quoted and billed Jalart • House. That is, \$50.00 per M based on 100,000 quantity.

However, as you know, we have absorbed a substantial freight loss. In examining our shipments we find that the Canadian and foreign destinations are quite high and, of course, this accounts for a substantial loss. Although, at present, we will actually come out behind, we need \$3.50 cwt on all shipments. Essentially, Stanley, this is what the domestic shipments are costing us.

Even at this, Stanley, we will show a loss on freight. However, we are anticipating that with additional volume and efficiencies we can cut this loss. Also, if you, after examining your galleys can cut or reduce your Canadian and foreign shipments, this will help. We don't intend to make a dime on freight but we cannot afford to lose our shirt either.

With this charge we can at least hold down our losses while measures are taken to relieve the situation. The additional charge will amount to about \$200 per magazine per month.

We are looking at \$81.00 per M on the 72 page format and \$56.00 per M on additional M's and \$77.00 per M on the 80 page and \$53.00 per M on additionals. After the first of the year we are making some mechanical adjustments that will assist us in making the 72 and 80 page formats and possibly this might effect some reductions. Let's discuss.

Mr. Stnaley Weston

- 2 -

August 26, 1969

I'll be in New York the middle of next month and am looking forward to meeting with you and Bob.

Warmest personal regards.

Sincerely,

Robert L. Gleason

RLG:mlm



August 29, 1969.

Mr. Bob Gleason Ennis Business Forms, Inc. Ennis, Texas 75119

Dear Bob:

This will confirm your letter of August 26th regarding the printing and shipping price structure for my new publishing arrangement.

The price per M is to be the same to us as it has been for the boxing and wrestling titles when they were published by Jalart House, Inc.: \$50 per M on 100,000 quantity, for 64 pages (on approximately the same newsprint paper as used for Jalart), including covers.

Regarding the increased shipping costs, we accept the price increase noted in your letter of an additional \$200 per magazine per month.

Thank you for the price quotes on 72 and 80 pages formats. We are analyzing your quotes and hope to discuss them when you are in New York next, trip.

Contrary to what we discussed regarding the changeover from Jalart House starting with the Dec/69 issue of International Boxing, both the Dec/69 issues, wrestling and boxing, will go trhough Jalart House, with the publisher changeover effective with the two January/70 issues.

Sincerely,

Stanley Weston

AMENDED VERIFIED COMPLAINT

SAME TITLE

- - - - - x

Plaintiff, complaining of defendant herein, by its attorney, STANLEY M. ESTROW, for its amended complaint, respectfully alleges:

AS AND FOR A FIRST CAUSE OF ACTION:

FIRST: That at all times hereinafter mentioned, plaintiff was and still is a New York corporation, having its principal place of business in the Borough of Manhattan, County, City and State of New York.

SECOND: That at all times hereinafter mentioned, plaintiff was and still is in the business of publishing periodicals intended for sale upon newsstands throughout the world.

THIRD: That upon information and belief, at all times hereinafter mentioned, defendant was and still is a foreign corporation having its principal place of business in Ennis, Texas.

FOURTH: That upon information and belief, at all times hereinafter mentioned, defendant operated manufacturing facilities for the printing, production and shipping of periodicals, both in Ennis, Texas (ENTEX

PUBLICATION DIVISION), and in Dallas Texas (STORM PRINTING COMPANY DIVISION).

FIFTH: That heretofore and at all times hereinafter mentioned, plaintiff was the publisher of periodicals entitled THE WRESTLER, WORLD BOXING, BOXING ANNUAL, INSIDE WRESTLING, POLICE DETECTIVE, POLICE DETECTIVE YEARBOOK, MEN IN ADVENTURE, MEN IN ADVENTURE YEARBOOK, INTERNATIONAL BOXING, ADVENTURE FOR MEN, ADVENTURE FOR MEN YEARBOOK, REAL DETECTIVE, REAL DETECTIVE YEARBOOK, HOW TO DATE AND MATE THROUGH ASTROLOGY, ACTION SPORTS BASEBALL YEARBOOK and ACTION SPORTS BASEBALL GUIDEBOOK.

SIXTH: That on or about the 22nd day of December 1969, plaintiff, through its duly authorized officer, received a written proposal from defendant for the production of plaintiff's publications which was accepted by plaintiff at its office in New York City, under date of January 16, 1970, marked Exhibit "A". Subsequent thereto, said agreement was further modified by memoranda from defendant increasing printing prices on certain of plaintiff's publications under dates of May 21, 1970, marked Exhibit "B", and June 2, 1970, marked Exhibit "C".

a) The contract annexed to the complaint as Exhibit "A", and dated December 22, 1969, effective as of January 16, 1970, set forth prices, specifications and other terms for what defendant characterized as the

"Adventure" and "Detective" series. The titles included in these categories were:

- A. Police Detective
- B. Police Detective Annual
- C. Real Detective
- D. Real Detective Annual
- E. Men in Adventure
- F. Men in Adventure Year
- G. Adventure for Men
- H. Adventure for Men Yearbook

All of the foregoing consisted of 80 pages and conformed to the specifications shown in Exhibit "A" annexed to the complaint.

- b) The defendant printed additional titles for the plaintiff under the general heading of "Boxing and Wrestling" as follows:
 - A. World Boxing
 - B. Boxing Illustrated
 - C. The Wrestler
 - D. Inside Wrestling
 - E. Boxing Annuals or Yearbooks
 - F. Wrestling Annuals or Yearbooks

The plaintiff, Rostam, in a joint publishing venture with G. P. London Publishing Company, Inc. (Stanley Weston, principal) undertook the printing and distribution of said titles which the defendant Ennis had theretofore printed for Jalart House, Inc. as confirmed by defendant Ennis by its letter dated August 26, 1969, Exhibit "D" annexed hereto. Confirmation and acceptance of that arrangement from plaintiff is set forth in Exhibit "E" Annexed hereto.

c) The following titles:

- A. How to Date and Mate Through Astrology
- B. Action Sports Baseball Yearbook
- C. Action Sports Baseball Guidebook

were printed by defendant Ennis under no separate contracts.

The defendant, through its Vice President, Ralph Lepthien, agreed to print said titles under the same specifications and under the same prices and terms then prevailing for the "Adventure" and "Detective" series.

SEVENTH: That pursuant to said proposals and modifications, defendant undertook to perform the manufacturing operations required in a good and workmanlike manner and to produce said publications in accordance with a time schedule to be agreed upon between the parties, and to perform all of such procedures in sufficient time to enable each of plaintiff's periodicals to be placed on sale by the retail newsdealers on a fixed pre-arranged date. That defendant's services included the use of defendant's private trucking facilities, did flat rate per hundredwright to reach the various wholesale local distributors and in turn the retail newsdealers in time for the fixed on sale-date.

Plaintiff duly performed all the terms and conditions required by said agreements and modifications thereof on the part of plaintiff herein.

NINTH: That heretofore, plaintiff prepared and

delivered to defendant for production, amongst other titles, as aforesaid, the August 1970 edition of POLICE DETECTIVE, the February 1971 edition of POLICE DETECTIVE, the January 1971 edition of REAL DETECTIVE, the June 1971 edition of REAL DETECTIVE and the August 1971 issue of POLICE DETECTIVE, pursuant to the agreements as aforesaid.

TENTH: That defendant neglected and failed to properly perform the manufacturing processes as provided for in the agreement between the parties, in that in the course of manufacturing said five issues, defendant failed to include and incorporate numerous pages of editorial material previously supplied by plaintiff to defendant and caused said issues to be shipped to the retail newsdealers with said sections missing, resulting in said issues being offered to the public in an incomplete and unsalable condition.

ELEVENTH: That plaintiff paid defendant the sum of \$38,745.35 for printing said five issues.

TWELFTH: That by reason of the premises as aforesaid, defendant breached its contract with plaintiff in producing said issues in that the same were not produced in a good and workmanlike manner and plaintiff was caused to and did expend the additional sum of \$21,997.40 for preparation of editorial content and shipping costs therefor, all to its damage in the total sum of \$60,742.75,

together with a loss of good will on the part of purchasers, (in an amount to be fixed by this court) who, having purchased said editions, would have failed and refused to purchase subsequent editions by reason of such defects.

AS AND FOR A SECOND CAUSE OF ACTION:

THIRTEENTH: Plaintiff repeats and realleges
each and every allegation contained in Paragraph "FIRST"
through "EIGHTH" hereof, with the same force and effect
as though set forth at length herein.

FOURTEENTH: That in entering into the agreement with defendant for the production of the publications as aforesaid, plaintiff made known to defendant and defendant acknowledged to plaintiff that the publications to be manufactured by defendant for plaintiff were intended for newsstand sale and distribution and that the production would be scheduled to provide for shipments to the various wholesale and retail dealers in said publications on a basis consistent with the frequency of publications of the particular periodical, either on a monthly, bimonthly, quarterly or annual frequency; that in accordance with said understanding, agreement and arrangement, plaintiff and defendant entered into various schedules of production setting forth the various dates for the commencement of production, for completion of shipments for the individual issues of each of the periodicals

published by plaintiff herein and the newsstand on-sale dates, which schedules defendant agreed to comply with.

FIFTEENTH: That in entering into the agreement with plaintiff, defendant was informed by plaintiff that the production dates were consistent with and pursuant to arrangements by plaintiff with its national distributor, Kable News Company, which company in turn had arranged the distribution schedule for plaintiff's periodicals to conform with and coincide with distributing procedures in the trade generally, with the ultimate object of having plaintiff's periodicals arrive at the various wholesalers and retailers on a predetermined schedule and in time for distribution to the retail newsstands on or before a given "on-sale date."

SIXTEENTH: That in addition to the arrangements made by plaintiff with Kable News Company, as aforesaid, plaintiff advised defendant that the aforementioned schedules provided for maximum exposure for plaintiff's titles for the frequency of publication referred to above so that a monthly publication would receive a 30-day exposure; a bi-monthly publication would receive a 60-day exposure; a quarterly publication would receive a 90-day exposure; etc., and that the cover dates for the various publications were advanced sufficiently to provide the exposure as aforesaid on newsstands during the same time period as

competitive publications produced by other publishers, which would bear the same cover dates and that any interruption or delay in the production and shipping as called for by the schedules would result in reduced sales periods and diminished sales for plaintiff's periodicals.

SEVENTEENTH: That in addition to the foregoing, plaintiff advised defendant that advertising would be solicited from advertisers for publication in plaintiff's periodicals with the advertising schedules coinciding with the on-sale dates scheduled and provided for in plaintiff's arrangements with Kable News Company, its distributor as aforesaid, and with defendant, the printer of plaintiff's periodicals, as aforesaid, and plaintiff further advised defendant that any interference with the schedules or delay in shipping would result in advertiser's promotions appearing on newsstands at times or periods other than those selected and predetermined by plaintiff's advertisers which would result in either advertiser's refusal to pay for the advertising, or by reason of the failure to receive the anticipated results, would refuse to continue to advertise in plaintiff's publications.

publications, as aforesaid, developed a cash flow for its anticipated income and for additional financing based on the frequency and continuity as provided in the schedule of production arranged between plaintiff and defendant

herein and defendant was so advised by plaintiff; defendant entered upon the production of plaintiff's periodicals with full knowledge of the need for prompt and consistent performance, and that time was of the essence, and that plaintiff's publishing stability and cash flow was dependent upon prompt performance by defendant herein.

NINETEENTH: That upon information and belief, between the period of October 1, 1970 and June 30, 1971 defendant, without knowledge thereof upon the part of plaintiff, caused plaintiff's periodicals to be shipped to the wholesale and retail newsdealers by means other than defendants trucking facilities, by means substantially slower and unsuitable for delivery within the scheduled time periods, and in addition completing shipments some ten to thirty days later than the scheduled completion dates and causing to be issued to plaintiff and to plaintiff's national distributor, Kable News Company, erroneous, misleading and untrue completion cards; that lacking information to the effect that defendant was wilfully concealing and misrepresenting the completion dates as aforesaid and the substitute and unacceptable method of shipping, plaintiff was unable to take any steps to rearrange on-sale dates with the wholesalers and retailers, to redate upcoming issues, to reschedule advertising and "on-sale date", to rearrange financing, and in addition, plaintiff's periodicals were caused to be placed on sale

during time periods which were disadvantageous to plaintiff in that competitor's publications bearing the same cover dates had then completed their periods of sale or had been withdrawn from sale with plaintiff's periodicals appearing on-sale after the normal sales period, and by reason of such cover dates, appeared to be out of date from the viewpoint of retail purchasers based on the practices and procedures adopted by competitive publishers and plaintiff herein for the dating and offering of such publications.

TWENTIETH: That by reason of the deception, misrepresentation and fraud of defendant in issuing said completion cards and substituting inferior and improper shipping procedures as aforesaid, plaintiff has been damaged in the sum of \$410,592.29.

AS AND FOR A THIRD CAUSE OF ACTION:

TWENTY-FIRST: Plaintiff repeats and realleges each and every allegation contained in Paragraph "FIRST" through "EIGHTH" hereof with the same force and effect as though set forth at length herein.

TWENTY-SECOND: That heretofore and in or about the months of March and April, 1971, plaintiff, in accordance with the previously arranged production schedules, provided defendant with all of the editorial material, advertising copy and shipping galleys for plaintiff's periodicals, i.e., ADVENTURE FOR MEN YEARBOOK NO. 6,

INSIDE WRESTLING, JULY 1971, WORLD BOXING, JULY 1971, THE WRESTLER, JULY 1971, POLICE DETECTIVE, AUGUST 1971, REAL DETECTIVE, AUGUST 1971, and ADVENTURE FOR MEN, AUGUST 1971.

TWENTY-THIRD: That at or about the time that said material was issued to defendant for production as aforesaid, defendant advised plaintiff that its printing plant in Ennis, Texas was having certain labor problems but that there would be no interruption or interference with the production and shipping of plaintiff's periodicals since defendant would be employing the facilities of its printing plant in Dallas, Texas (STORM PRINTING CO.) and would be completing the binding and shipping by the use of their executive and other supervisory personnel at their plant in Ennis, Texas.

TWENTY-FOURTH: That defendant reported to plaintiff that INSIDE WRESTLING, JULY 1971, WORLD BOXING, JULY 1971 and THE WRESTLER, JULY 1971, had completed shipments on May 18, 1971, substantially later than scheduled, whereas in truth and in fact, said shipments were improperly label d and had to be recalled, and their cover dates were unsuitable for newsstand distribution at that late date; that in fact said issues were subsequently destroyed by defendant. ADVENTURE FOR MEN YEARBOOK NO. 6 had been included in the improperly labeled shipments which had been recalled and was also destroyed. In addition, defendant advised plaintiff that POLICE DETECTIVE, AUGUST

1971, REAL DETECTIVE, AUGUST 1971, ADVENTURE FOR MEN, AUGUST 1971, which had been scheduled for completion on May 17, 1971, had been shipped completely by May 24, 1971, whereas in truth and in fact, said information was false, fraudulent and misleading in that shipping was not completed until June 11, 1971.

TWENTY-FIFTH: That on or about May 25, 1971, defendant advised plaintiff that it would not be able to print subsequent editions of plaintiff's periodicals despite its assurances that the strike as aforesaid would not interfere with their production; that at the time of the receipt of such information from defendant, plaintiff had submitted to defendant additional editorial material for subsequent editions of its periodicals, much of which had time value in that unless it appeared on sale to the reading public at the time scheduled by plaintiff, the information would be stale and of little or no value to the public and would result in the diminution in value of plaintiff's periodicals to the purchaser, thereby reducing or eliminating the possibility of selling the same on the newsstands because the material would be dated and of no value to the purchaser.

TWENTY-SIXTH: That by reason of defendant's failure to produce and timely ship INSIDE WRESTLING, JULY 1971, WORLD BOXING, JULY 1971 and THE WRESTLER, JULY 1971, plaintiff suffered damage in that all of the editorial expense in preparing photographs and editorial material,

typesetting, camera work, advertising and newsstand income was lost to plaintiff, together with the loss of good will in that the continuity of the appearance of plaintiff's publications on the newsstands was seriously interfered with.

TWENTY-SEVENTH: That by reason of the delay in shipping the August 1971 issues of POLICE DETECTIVE, REAL DETECTIVE, ADVENTURE FOR MEN, by three (3) weeks or more beyond the scheduled date, said periodicals, in many cases, were not placed on sale by the wholesale and retail news dealers and were returned unsold to plaintiff's national distributor and to plaintiff herein, resulting in a loss of newsstand income, shipping expense, editorial expense and overhead expense, in addition to the loss of good will on the part of its regular purchasers, in an amount to be fixed by this court.

TWENTY-EIGHTH: That by reason of the premises, plaintiff was damaged in the sum of \$11,698.63, together with the loss of good will as aforesaid.

AS AND FOR A FOURTH CAUSE OF ACTION:

TWENTY-NINTH: Plaintiff repeats and realleges each and every allegation contained in paragraph "FIRST" through "EIGHTH" and "FOURTEENTH" through "EIGHTEENTH" hereof, with the same force and effect as though set forth at length herein.

THIRTIETH: That upon receipt of the information from defendant on or about May 24, 1971, that defendant was unable to continue with the production of plaintiff's periodicals pursuant to contract, plaintiff found itself without printing facilities and was caused to seek other sources for the manufacturing of plaintiff's periodicals.

THIRTY-FIRST: That thereafter and on or about the 21st day of June, 1971, plaintiff secured other printing facilities for the production of plaintiff's periodicals.

THIRTY-SECOND: That by reason of the action of defendant in cancelling its agreement with plaintiff as aforesaid, plaintiff was unable to produce the following issues of plaintiff's periodicals, resulting in a loss of continuity, loss in sales, loss in advertising income and loss of cash flow:

THIRTY-THIRD: That by reason of the breach of contract as aforesaid by defendant, plaintiff was damaged in the sum of \$26,000.00, together with a loss of good will in an amount to be fixed by this court.

AS AND FOR A FIFTH CAUSE OF ACTION:

THIRTY-FOURTH: Plaintiff repeats and realleges
paragraphs "FIRST" through "EIGHTH" and "FOURTEENTH"
through "NINETEENTH" hereof, with the same force and

effect as though set forth at length herein.

THIRTY-FIFTH: That by reason of the failure of the defendant to perform said contract, and to produce and ship plaintiff's publication at the times agreed upon, and by the various methods of transportation theretofore agreed upon, the on-sale periods of plaintiff's publication were seriously and adversely affected, in that their sales periods were shortened, and made non-competitive with similar publications offered to the buying public at the retail newsstands.

of contract, as aforesaid, plaintiff's sales of its publications were reduced by an amount equal to 15% of the gross distribution, on all issues of plaintiff's periodicals printed and shipped by the defendant, such 15% loss in sales of gross distribution representing in total the sum of \$418,160.53, which additional sum plaintiff would have and should have received from the newsstand sale, had the defendant performed the printing and shipping of plaintiff's publications in the manner and at the times agreed upon.

THIRTY-SEVENTH: That plaintiff has been damaged in the sum of \$418,160.53.

AS AND FOR A SIXTH CAUSE OF ACTION:

THIRTY-EIGHTH: Plaintiff repeats and realleges

paragraphs "FIRST" through "EIGHTH" and "FOURTEENTH",
"FIFTEENTH" and "NINETEENTH" hereof, with the same force
and effect as though set forth at length herein.

THIRTY-NINTH: That in addition to the failure to properly produce and timely ship plaintiff's periodicals as aforesaid, plaintiff has now been advised and billed by its national distributor, Kable News Company, for shortages in shipments to various wholesale newsdealers covering the period as aforesaid.

FORTIETH: That under date of September 29, 1973, the plaintiff was billed the sum of \$1,716.03 for the shortages in shipments, as aforesaid.

FORTY-FIRST: That the plaintiff has been damaged in the sum of \$1,716.03.

WHEREFORE, plaintiff demands judgment against defendant:

On the First Cause of Action in the sum of \$60,742.75;

On the Second Cause of Action in the sum of \$410,592.29;

On the Third Cause of Action in the sum of \$11,692.63;

On the Fourth Cause of Action in the sum of \$26,000.00;

On the Fifth Cause of Action in the sum of \$418,160.53;

On the Sixth Cause of Action in the sum of \$1,716.03;

together with appropriate interest, costs and disbursements.

[Verified by Robert Stampleman on September 19th, 1974] Yours, etc. STANLEY M. ESTROW, ESQ. Attorney for Plaintiff Office and P.O. Address 529 Fifth Avenue New York, N.Y. 10017 (212) 986-9345

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ROSTAM PUBLISHING CO. . :

Plaintiff, :

-against-

ANSWER

ENNIS BUSINESS FORMS, INC. : 74 Civ. 868 (ENTEX PUBLICATION DIVISION), R. J. W.

Defendant.

Defendant, by Kaye, Scholer, Fierman, Hays & Handler, its attorneys, answers the amended complaint herein as follows:

AS TO THE FIRST CAUSE OF ACTION

- 1. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation of Paragraphs FIRST and SECOND of the complaint.
- 2. Denies each and every allegation of Paragraph FOURTH of the complaint, except that defendant admits that defendant operated manufacturing facilities for the printing, production and shipping of periodicals in Ennis, Texas and in Dallas, Texas.
- 3. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation of Paragraph FIFTH of the complaint.
- 4. Denies each and every allegation of Paragraphs SIXTH and SEVENTH of the complaint, except that defendant denies knowledge or information sufficient to form a belief

as to the truth of each and every allegation referring or relating to plaintiff's alleged venture with G.P. London Publishing Company, Inc., and except that defendant admits that it sent a written proposal dated December 22, 1969, marked Exhibit "A," and the letters dated May 21, 1970, June 2, 1970, and August 26, 1969, marked Exhibits "B," "C," and "D," respectively, and that it received a letter dated August 29, 1969, marked Exhibit "E," and defendant respectfully refers to said exhibits as the best evidence of their respective terms and contents.

- 5. Denies each and every allegation of Paragraph EIGHTH of the complaint.
- 6. Denies each and every allegation of Paragraph NINTH of the complaint, except that defendant admits that the August 1970, February 1971 and August 1971 editions of POLICE DETECTIVE and the January 1971 and June 1971 editions of REAL DETECTIVE were delivered to defendant for production.
- 7. Denies each and every allegation of Paragraphs
 TENTH, ELEVENTH and TWELFTH of the complaint.

AS TO THE SECOND CAUSE OF ACTION

- 8. In answer to Paragraph THIRTEENTH of the complaint herein, defendant repeats and realleges each and every allegation contained in Paragraphs 1 through 5 hereof with the same force and effect as if set out in full herein.
- 9. Denies each and every allegation of Paragraph FOURTEENTH of the complaint, except that defendant admits that the publications described in Exhibit "A" were intended for newsstand sale and that shipment of said publications to various dealers would be based upon each periodical's

publication frequency.

- graphs FIFTEENTH and SIXTEENTH of the complaint, except that defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations referring or relating to any arrangements made by plaintiff with Kable News Company, or any actions taken by Kable News Company thereafter.
- 11. Denies each and every allegation of Paragraph SEVENTEENTH of the complaint.
- 12. Denies each and every allegation of Paragraph EIGHTEENTH of the complaint, except that defendant denies knowledge or information sufficient to form a belief as to each and every allegation referring or relating to the development by plaintiff of a cash flow for its anticipated income and for additional financing.
- 13. Denies each and every allegation of Paragraph NINETEENTH of the complaint, except that defendant admits that certain cards were sent by defendant which contained, in certain instances, inaccurate shipment dates.
- 14. Denies each and every allegation of Paragraph TWENTIETH of the complaint.

AS TO THE THIRD CAUSE OF ACTION

15. In answer to Paragraph TWENTY-FIRST of the complaint, defendant repeats and realleges each and every allegation contained in Paragraphs 1 through 5 hereof with

the same force and effect as if set out in full herein.

- 16. Denies each and every allegation of Paragraph TWENTY-SECOND of the complaint, except that defendant admits that plaintiff, during March and April, 1971, provided defendant with certain editorial material, advertising copy and shipping galleys.
- TWENTY-THIRD of the complaint, except that defendant admits that it advised plaintiff about certain labor problems in defendant's printing plant in Ennis, Texas, and that defendant planned to employ the facilities of its printing plant in Dallas, Texas and use executive and other supervisory personnel at its plant in Ennis, Texas during the period of said labor problems.
- 18. Denies each and every allegation of Paragraph TWENTY-FOURTH of the complaint, except that defendant admits and alleges that the issues of INSIDE WRESTLING, July 1971, WORLD BOXING, July 1971, THE WRESTLER, July 1971, and ADVENTURE FOR MEN YEAR BOOK No. 6 were destroyed at the request of plaintiff, and no charges were invoiced to plaintiff thereon.
- 19. Denies each and every allers of Paragraph
 TWENTY-FIFTH of the complaint, except that defendant admits
 that it advised plaintiff that it would not be able to
 print subsequent editions of its periodicals.
- 20. Denies each and every allegation of Paragraphs TWENTY-SIXTH, TWENTY-SEVENTH and TWENTY-EIGHTH of

the complaint.

AS TO THE FOURTH CAUSE OF ACTION

- 21. In answer to Paragraph TWENTY-NINTH of the complaint, defendant repeats and realleges each and every allegation contained in Paragraphs 1 through 5 and 9 through 12 hereof with the same force and effect as if set out in full herein.
- 22. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation of Paragraphs THIRTIETH and THIRTY-FIRST of the complaint.
- 23. Denies each and every allegation of Paragraph
 THIRTY-SECOND and THIRTY-THIRD of the complaint.

AS TO THE FIFTH CAUSE OF ACTION

- 24. In answer to Paragraph THIRTY-FOURTH of the complaint, defendant repeats and realleges each and every allegation contained in Paragraphs 1 through 5 and 9 through 13 hereof with the same force and effect as if set out in full herein.
- 25. Denies each and every allegation of Paragraphs THIRTY-FIFTH, THIRTY-SIXTH and THIRTY-SEVENTH of the complaint.

AS TO THE SIXTH CAUSE OF ACTION

26. In answer to Paragraph THIRTY-EIGHTH of the

complaint, defendant repeats and realleges each and every allegation contained in Paragraphs 1 through 5, 9, 10 and 13 hereof with the same force and effect as if set out in full herein.

- 27. Denies each and every allegation of Paragraph THIRTY-NINTH of the complaint, except that defendant denies knowledge or information sufficient to form a belief as to the truth of the allegations referring or relating to any actions taken by Kable News Company.
- 28. Denies each and every allegation of Paragraphs FORTIETH and FORTY-FIRST of the complaint.

FIRST AFFIRMATIVE DEFENSE

29. The complaint fails to state a claim against defendant upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

- 30. Neither the agreement alleged in the complaint nor any memorandum of the substantive terms thereof was ever made in writing and subscribed to by the defendant herein or by its lawful agent.
- 31. By reason of the foregoing, plaintiff is barred and precluded from maintaining its action because the agreement alleged in the complaint is unenforceable under the Statute of Frauds.

FIRST AFFIRMATIVE DEFENSE TO THE SIXTH CAUSE OF ACTION

- 32. On May 8, 1973, as part of the disposition of several Texas litigations in the United States District Court for the Northern District of Texas, Ennis Business Forms,

 Inc. v. Cord Communications Corporation (C.A.-3-6282-C) and Ennis Business Forms, Inc. v. Kable News Company, Inc.

 (C.A.-3-6291-E), Kable News Company, Inc. ("Kable") formally released its claim against defendant for certain alleged shortages, amounting to \$10,575.55, of which \$7,227.30 consisted of shortages claimed on behalf of the plaintiff. Annexed hereto as Exhibit "A" is a copy of said release.
- 33. Upon information and belief, defendant, by this instrument dated May 8, 1973, and by the concurrent dismissal of the Texas actions with prejudice, was released and forever discharged from all claims and liabilities set forth in the cause of action herein.

SECOND AFFIRMATIVE DEFENSE TO THE SIXTH CAUSE OF ACTION

- 34. Repeats and realleges, with the same force and effect as though set forth in full herein, Paragraphs
 THIRTY-SECOND and THIRTY-THIRD.
- 35. Plaintiff did accept the benefits of said agreement of rinal release and compromise in full accord and satisfaction of any and all claims and liabilities set forth in the cause of action herein.

WHEREFORE, defendant demands judgment dismissing the complaint herein and for such other and further relief as to this Court may seem just and proper.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

Rv

Member of the Firm

Attorneys for Defendant 425 Park Avenue New York, New York 10022 (212)-759-8400 THE STATE OF TEXAS

RELEASE

NOW COME Ennis Business Forms, Inc., by and through its attorney and authorized agent Ralph E. Hartman, and Kable News Company, Inc., by and through its attorney and authorized agent H. Dee Johnson, Jr., and execute the following mutual release, to wit:

- Lennis Business Forms, Inc., does hereby release
 Kable News Company, Inc., and all other corporations, associations,
 and individuals from any and all liability or obligation on those
 three certain assignments of funds under contracts between Kable
 News Company, Inc., and Cord Communications Corporation, said
 assignments being dated June 17, 1971, August 5, 1971, and December 6,
 1971, and being the three assignments forming the basis of Ennis
 Business Forms, Inc.'s cause of action against Kable News Company,
 Inc., in Civil Action No. CA-3-6282-C (consolidated) in the United
 States District Court for the Northern District of Texas, Dallas
 Division;
- 2. Kable News Company, Inc., does hereby release Ennis Eusiness Forms, Inc., and all other corporations, associations, or individuals from any and all liability or obligation on or for those certain claims for shipment shortages on the shipment of printed material on Ennis Business Forms, Inc.'s bill of lading, said claims totaling \$10,579.55 and being the claims for ling the basis for Kable News Company, Inc.'s cause of action against Ennis Business Forms, Inc., denominated Counterclaim, in Civil Action No. CA-3-6291-E in the United States District Court for the Northern District of Texas, Dallas Division;

- 3. It is agreed that an agreed judgment shall be : entered in Civil Action No. CA-3-6282-C, entitled Ennis Business Forms, Inc. v. Cord Communications Corporation and Kable News Company, Inc., in the United States District Court, Northern District of Texas, Dallas Division, in accordance with the form of judgment attached hereto as Appendix A;
- 4. It is agreed that an agreed judgment shall be entered in Civil Action No. CA-3-6291-E, entitled Ennis Business · Forms, Inc. v. Kable News Company, Inc., United States District Court, Northern District of Texas, Dallas Division, in accordance with the form of judgment attached as Appendix B;
 - 5. Consideration for this release are the mutual promises contained herein, and the agreement of the parties has been fully reduced to writing herein.

Signed in duplicate originals this

1973.

ENRIS BUSINESS FORMS, INC.

Ralph E. Hartman

First National Bank Juilding Dallas, Texas 75201

KABLE NEWS COMPANY, INC.

BY:

BY:

1900 Mercantile Dallas Building

Dallas, Texas 75201

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

ENNIS BUSINESS FORMS, INC.

vs.

CIVIL ACTION

CORD COMMUNICATIONS CORPORATION and KABLE NEWS COMPANY, INC.

NO. 3-6282-C

ORDER

Having been advised by the attorneys for all parties in the above styled and numbered cause that all claims in said cause have been settled and that as part of the settlement agreement, the sum of \$38,021.65, which was filed in the registry of this court, should be paid to Ennis Business Forms, Inc., I find that this cause should be dismissed in its entirety and that the sum of \$38,021.65 which was paid into the registry of this court should be paid to Ennis Business Forms, Inc.

It is, therefore, ORDERED, ADJUDGED and DECREED that all claims between all parties in this lawsuit are hereby dismissed with prejudice, with each party bearing his own costs; and, furthermore, I direct the District Clerk to pay the entire sum of \$38,021.65, which was filed in the registry of this court, to Ennis Business Forms, Inc., plaintiff in this cause.

ENTERED this 8 day of May, 1973.

COPY

U. S. District Judge

Approved as to form:

JACKSON, WALKER, WINSTEAD, CANTWELL & MILLER First National Bank Building Dallas, Texas 75202

by Karthella.

Ralph Hartman

Attorney for Ennis Business Forms, Inc.

JOHNSON, CRAVENS & BOONE 1900 Mercantile Dallas Building Dallas, Texas 75201

By 11. C. 1. 14

H. Dee Johnson, Jr. Attorney for Kable News Company, Inc.

COKE & COKE
3600 First National Bank Building
Dallas, Texas 75202

Patrick E. Rigginbotham
Attorney for Cord Communications Corporation

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

ENNIS BUSINESS FORMS, INC.

VS.

KABLE NEWS COMPANY, INC.

CIVIL ACTION NO.

CA-3-6291-E

FINAL JUDGMENT

BE IT REMEMBERED that on this the ____ day of May, 1973, came on to be heard the above numbered and styled cause of action, and came the parties by and through their attorneys of . record and announced to the Court that all matters in controversy . have been comprised and settled and prayed the Court enter its order of dismissal with prejudice.

It is, therefore, ORDEREL, ADJUDGED, and DECREED that Civil Action No. CA-3-6291-E in which Ennis Business Forms, Inc., is Plaintiff and Kable News Company, Inc., is Defendant be and is hereby in all things dismissed with prejudice to its refiling.

> Each party shall bear its own costs, Signed and Ordered Entered this 5 day of May, 1973.

APPROYED

Ralph E. Hartman of JACKSON, WALKER, WINSTEAD, CANTWELL

4300 First National Bank Building Dallas, Texas 75202 Attorney for Plaintiff

H. Dee Jonnson, Jr. of JOHNSON & CRAVENS 1900 Mercantile Dallas Building Dallas, Texas 75201 Attorney for Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROSTAM PUBLISHING CO.,

Plaintiff, :

-against-

: ORDER TO SHOW CAUSE

ENNIS BUSINESS FORMS, INC., (ENTEX PUBLICATION DIVISION),

74 Civ. 868 R. J. W.

Defendant.

Upon the annexed affidavit of Sheldon Oliensis, sworn to the 15th day of October, 1974, upon the summons and complaint herein, and upon all the papers and proceedings heretofore had herein, including the affidavits heretofore filed herein by Nelson Ward, sworn to March 27, 1974, and Sheldon Oliensis, sworn to April 1, 1974, May 16, 1974 and June 14, 1974, and good cause appearing therefor, it is

ORDERED, that plaintiff show cause before the Honorable Robert J. Ward, District Judge, in the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the /8th day of October at or as soon thereafter as counsel can be heard, why an order should not be entered herein staying plaintiff from further prosecution of this action pending determination of the action now pending in the United States District Court for the Northern District of Texas, Ennis Business Forms, Inc. v. Rostam Publishing, Inc., Civil Action Number 3-74-558C, and granting such other and further relief as to this Court

may seem just and proper; and it is further

ORDERED, that service of this order to show cause, together with the papers attached hereto, upon plaintiff or its counsel on or before the day of October, 1974, be deemed sufficient service.

Dated: New York, New York October , 1974.

U. S. D. J.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ROSTAM PUBLISHING CO.,

Plaintiff, : AFFIDAVIT

-against-

74 Civ. 868

R. J. W.

ENNIS BUSINESS FORMS, INC. (ENTEX PUBLICATION DIVISION),

Defendant.

STATE OF NEW YORK ss.: COUNTY OF NEW YORK)

SHELDON OLIENSIS, being duly sworn, deposes and says:

1. I am an attorney-at-law and a member of the firm of Kaye, Scholer, Fierman, Hays & Handler, attorneys for defendant herein. I submit this affidavit in support of defendant's motion to stay plaintiff from prosecuting the instant action, pending determination of an action now pending between the parties in the United States District Court for the Northern District of Texas. This affidavit is further submitted in opposition to plaintiff's motion seeking to stay defendant from proceeding with the Texas litigation. Ennis is moving by order to show cause so that its motion for a stay may be formally before this Court at the time of the hearing of plaintiff's motion on October 18. (A copy of the order to show cause and supporting affidavit is being served on plaintiff prior to its submission to the Court.)

2. Defendant notes that, on the instant motions, plaintiff's choice of forum - a factor relied on by the Court in its disposition of defendant's earlier transfer motion - cannot be a decisive factor. The instant motions are, instead, addressed to the equitable discretion of the Court, and, for the reasons set out below, defendant respectfully submits, defendant's instant motion should be granted and plaintiff's motion denied.

Prior Proceedings Herein

3. Plaintiff served the complaint in the instant action on or about January 31, 1974, having previously served a summons, without a complaint, on or about December 1, 1971. The summons and complaint in the Texas litigation were served by Ennis upon the Secretary of State of the State of Texas on February 20, 1974, and, under Texas law, service was complete with that act. (See Oliensis Affidavit, May 16, 1974, 119 and Exhibit C). As noted in the papers earlier filed in this action, Ennis had withheld filing suit against Rostam in Texas in the expectation that its dispute with Rostam could be amicably resolved. (Ward Affidavit, March 27, 1974, p. 2).*

When Rostam denied having received a copy of the summons and complaint mailed to it by the Secretary of State of Texas on February 20, a second copy was, at Ennis' request, mailed to Rostam by the Secretary of State on May 17. As above noted, the Texas action was, as a matter of law, commenced by the delivery of the summons and complaint to the Secretary of State on February 20.

4. An "amended verified complaint" in the New York action was served by Rostam on or about September 20, 1974.

The Denial of Ennis' Motion to Transfer

- 5. On April 1, 1974, Ennis moved to transfer this action to the United States District Court for the Northern District of Texas pursuant to § 1404(a) of Title 28 of the United States Code. That motion was denied by the Court in an opinion, filed August 1, 1974. In its opinion, the Court first examined the convenience of parties and witnesses* and concluded that, so far as the presentation of live testimony was concerned, transfer "would merely shift the burden of inconvenience." (Opinion, p. 5). "Since plaintiff's choice of forum remains a factor to be considered," the Court ruled, Ennis' motion to transfer must be denied, unless there were additional factors indicating the desirability of transfer. (Ibid.)
- 6. The opinion then reviewed other factors.

 While noting that defendant's relevant documents, occupying sixteen feet of filing space, were all in Ennis, Texas

The Court noted that, of ten proposed witnesses on behalf of Ennis, nine resided in the Northern District of Texas, one in California; of the nine Texas witnesses, only two were in Ennis' employ and subject to its control; that plaintiff listed seven competent proposed witnesses, six of whom resided in the New York area (Opinion, pp. 3-5).

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(Opinion, p. 4), the Court stated that it was likely that framing of the issues prior to trial would substantially reduce the number of documents required and that the required documents could then be duplicated without undue burden.

(Opinion, pp. 5-6). The Court also concluded that Texas law would appear to be applicable, but stated that there had been no indication that Texas law differed from New York law concerning the matters at issue.* The Court further rejected Ennis' contention that a view of the premises was essential to effective presentation of Ennis' case.** The Court also rejected as a relevant factor certain pending and prior litigations in Texas. (Opinion, p. 7).

Rostam's Motion to Stay Ennis From Proceeding in the Texas Litigation

7. Rostam has now moved to stay Ennis from proceeding with the Texas litigation - a step which would effectively deprive Ennis of its choice of the Texas forum - the very factor which this Court viewed as dispositive in refusing the transfer to Texas sought by Ennis. If Rostam

Such a determination would seem to require, <u>ipso facto</u>, examination by this Court of foreign law and would seem subject to precisely the same pitfalls that the Supreme Court cautioned against in <u>Gulf Oil Corp.</u> v. <u>Gilbert.</u> (See quotation in Opinion, p. 6).

A view of the premises at this time, the Court stated, would not be relevant to the way the plants functioned three years ago, especially since the plants had been sold in 1971 and 1972. In reaching this conclusion, the Court apparently did not accord weight to the statement in defendant's affidavit that the plant continues to be operated in substantially the same way by its new owners. (Ward Affidavit, March 27, 1974, p. 7n).

were successful in this mancuver, the anomalous result would be that - in an action where "the majority of material witnesses"* are in Texas, where virtually all the relevant documents are in Texas, where Texas law controls and where the contested performance took place on Texas premises - Ennis would be stayed by judicial order from being heard in Texas. Not only would such stay be totally unwarranted - particularly in view of Rostam's conduct in the Texas litigation, detailed below, - but, under the criteria applicable on motions of this kind, it is submitted that this action should be stayed and the Texas action permitted to proceed, and Ennis has now so moved.

Rostam's Dilatory Conduct in the Texas Litigation

- 8. As a basis for its motion to stay the Texas litigation, Rostam complains of "harassment" by Ennis in that litigation. (Estrow Affidavit, September 18, 1974, ¶ 7). Ennis agrees that what has been happening in the Texas litigation is of the highest relevance on the instant motions and joins Rostam in urging that this Court consider those events on these motions.
- 9. The Texas litigation was begun, as above noted, on February 20, 1974. Rostam denied having received the summons and complaint mailed to Rostam by the Secretary

Fogel v. Wolfgang, 48 F.R.D. 286, 291 (S.D. N.Y. 1969), quoted at Opinion, p. 3.

of State of Texas on that date, and Rostam accordingly did not move or answer until June 19, after a second summons and complaint had been mailed to it. On that date, Rostam interposed an objection to the jurisdiction - a motion that Rostam could hardly have made in good faith since, as Rostam is surely aware,* the Texas long-arm statute specifically provides for jurisdiction over persons who enter into a "contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State " (Texas Revised Civil Statutes, Article 2031b, Section 4) - jurisdictional facts which were indisputably present here.

directed solely to the jurisdictional question, seeking to establish simply the fact of the contract and the Texas performance contemplated by it. (See Estrow Affidavit, September 18, 1974, Exhibit C). Admission of these two facts would have resulted in the immediate denial of Rostam's motion. Instead of either responding or objecting to the interrogatories as required by the Federal Rules, Rostam simply ignored them. After a month, on or about August 12, Ennis' attorney wrote Rostam's Texas attorney complaining of Rostam's delay in furnishing answers to

See, e.g., Defendant's Reply Memorandum, May 16, 1974, p. 4 (citing and quoting the relevant Texas long-arm statute).

the interrogatories (see <u>id.</u>, Exhibit D), and Rostam's Texas attorney wrote to Rostam's New York attorney on August 14 so advising him. (<u>Ibid</u>). Rostam still did nothing.

- 11. Several weeks later, when Rostam had still not responded, Ennis, on or about August 26, moved for sanctions for Ros am's failure to answer the interrogatories. (Id., Exhibits F and G). Rostam's Texas counsel so advised Rostam's New York counsel, adding: "It is our opinion that we have to answer these Interrogatories and should do so as promptly as possible." (Id., Exhibit F). Rostam still did nothing. On September 19, Ennis, having gotten nowhere through its attempt to secure responses to the interrogatories, moved to take Rostam's deposition. At that point, Rostam finally did something - it moved for a protective order, to avoid having to make any response, relying on the instant motion made in this Court to stay the Texas proceeding and urging that the deposition not be taken pending determination of Rostam's motion for a stay. (Exhibit A hereto).
- 12. The end of the jurisdictional charade took place on October 3, when, with the day of reckoning fast approaching, Rostam withdrew and waived its motion to the jurisdiction (Exhibit B hereto), stating that it did so "after becoming aware of all of the facts of this matter."

 (Ibid.) Simultaneously, Rostam moved in Texas for a "change of venue" of the Texas action to New York, but requested that the Texas Court withhold action on that motion until

after this Court's determination of Rostam's motion for a stay. (Exhibit C hereto).

- knew to be groundless and then withdrawing the motion on the eve of adjudication, after it had served its purpose in delaying the Texas litigation for months is no mere happenstance. It is a precise duplicate of the course followed by Kable and Cord in the actions brought against them by Ennis in Texas: there too, dilatory motions objecting to the jurisdiction were interposed, there too, substantial delay was engendered by the interposition of such motions, including the failure for months to respond to interrogatories, and there too, the motions were, in one instance, withdrawn and, in the other, adjudicated adversely to the moving party, who then admitted jurisdiction.
- 14. Ennis respectfully submits that Rostam should not be rewarded for its improper tactics and endless maneuvering, particularly where, as here, it is appealing to the equitable discretion of the Court. On the instant motions, the criterion of plaintiff's choice of forum cancels out Rostam has chosen New York, Ennis has chosen Texas and, all other criteria, Ennis submits, mandate that this action be stayed and the Texas action be permitted to proceed.

15. No prior request has been made for the relief sought herein.

Subscribed and sworn to before me this 15th day of October, 1974.

Amiela daker.

DANIEL A. MAHER
Notary Politic, Steel of New York
No. 411 56550
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Cartilla no letter in Law York County
Continue to the limit. W York County
Continue to the limit.

RULE 26 MOTION FOR PROTECTIVE ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

ENNIS BUSINESS FORMS, INC.

v.

ROSTAM PUBLISHING, INC.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Rostam Publishing, Inc. and pursuant to the provisions of Rule 26 (c) of the Federal Rules of Civil Procedure makes this Motion for a protective order and as grounds therefor would respectfully show the Court the following:

I.

By notice dated September 19, 1974, Plaintiff, Ennis Business Forms, Inc., gave notice to the undersigned attorney for the Defendant, Rostam Publishing, Inc., that it would take the deposition of Robert Stampleman upon oral examination at 10:00 o'clock A.M. on September 28, 1974 in the offices of Jackson, Walker, Winstead, Cantwell & Miller, 44th Floor, First National Bank Building, Dallas, Texas.

II.

At the time of the undersigned's receipt of the aforementioned notice said Robert Stampleman was out of the country and will not be back in the United States until

September 30, 1974 and is, therefore, unable to be present at the time and place specified in the aforementioned notice.

III.

Prior to the filing of the instant suit by the Plaintiff, Ennis Business Forms, Inc., the Defendant, Rostam Publishing, Inc., had filed suit against the same Ennis Business Forms, Inc. in the Supreme Court of the State of New York, which action was on February 25, 1974 removed to the United States District Court for the Southern District of New York. Attached hereto is a true and correct copy of the complaint filed by Rostam Publishing, Inc. in said case. The case in the United States District Court in New York and the present case both arise out of the same transactions and set of facts and the cause of action filed by Ennis Business Forms, Inc. in this Court is a compulsory counterclaim in the New York case.

IV.

In the New York case, Ennis Business Forms, Inc. made a Motion pursuant to 28 U.S.C. Section 1404(a) to transfer said case to the Northern District of Texas.

Attached hereto is a copy of the Order and Opinion of the United States District Court for the Southern District of New York dated August 1, 1974 overruling Ennis' Motion and refusing to transfer the case to the Northern District of Texas.

v.

In the said New York case, Rostam Publishing,
Inc. has filed a Motion requesting the said Court to stay
said Ennis Business Forms, Inc. from further prosecuting
or in anyway proceeding with the instant action in this
Court. Said Motion was set to be heard on Friday,
September 27, 1974, but at the request of Ennis Business
Forms, Inc. has been reset for Tuesday, October 1, 1974.

WHEREFORE, Rostam Publishing, Inc. prays that this Court enter an Order that the deposition of Robert Stampleman not be taken on September 28, 1974 as per the aforementioned notice and that the deposition of Robert Stampleman not be taken at any time prior to the entry of an Order by the United States District Court for the Southern District of New York on Rostam Publishing, Inc.'s Motion for a stay.

Respectfully submitted, GOLDEN, POTTS, BOECKMAN & WILSON 2300 Republic National Bank Tower Dallas, Texas 75201 (214) 742-8422

By Geo. Garrison Potts

WITHDRAWAL OF DEFENDANT'S MOTION TO THE JURISDICTION

SAME TITLE

----X

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Rostam Publishing, Inc. which after becoming aware of all of the facts of this matter does hereby withdraw and waive its Motion to the Jurisdiction on file herein.

GOLDEN, POTTS, BOECKMAN & WILSON 2300 Republic National Bank Tower Dallas, Texas 75201 (214) 742-8422

By s/ Geo. Garrison Fotts
GEO. GARRISON POTTS

MOTION FOR CHANGE OF VENUE

----x

SAME TITLE

- - - - - X

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Rostam Publishing, Inc., Defendant, and makes this Motion to the Court to transfer this action to the United States District Court for the Southern District of New York pursuant to Section 1404(a), Title 28 of the United States Code, for the convenience of parties and witnesses, in the interest of justice, in that in said United States District Court for the Southern District of New York under Docket No. 74 Civ. 868 R.J.W. an action is pending in which the said Rostam Publishing, Inc. is Plaintiff and said Ennis Business Forms, Inc. is Defendant. Said action was commenced in the Supreme Court of the State of New York by Rostam Publishing, Inc. on December 1, 1971, and the Defendant Ennis appeared therein on December 31, 1971. On February 25, 1974 said action was removed to the United States District Court for the Southern District of New York.

Thereafter, in said case, the Defendant Ennis made motion to transfer said action to the United States

District Court for the Northern District of Texas pursuant to the provisions of Title 28 U.S.C. Sec. 1404(a). On

August 1, 1974, said Court entered its Order and Opinion denying such transfer, a copy of which Opinion and Order is attached hereto.

The present action arises out of the same transaction and set of facts as the action in the United

States District in New York and therefore is under Rule

13 of the Federal Rules of Civil Procedure, a compulsory

counterclaim in the New York case. Attached hereto is a

copy of the Complaint filed by Rostam in said case in the

Supreme Court for the State of New York and Rostam's

Amended Complaint in the United States District Court in

New York.

States District Judge for the United States District
Court of the Southern District of New York entered an
Order to Show Cause directing said Ennis Business Forms,
Inc. to show cause why it should not be stayed for proceeding with the present action. Said Order to Show Cause
was originally returnable on September 27, 1974, at 12:00
p.m., however, it was reset by agreement of the attorneys
for both Rostam and Ennis for October 1, 1974 and has
been again reset by their agreement to a later date.
A copy of said Order to Show Cause is attached hereto.

WHEREFORE, Defendant, Rostam Publishing, Inc., respectfully requests the Court to withhold action upon this Motion until decision has been made in the United

States District Court for the Southern District of New York on the aforementioned Order to Show Cause why Ennis should not be stayed from proceeding with this action and that if such a stay be not granted, that this Court for the convenience of parties and witnesses and in the interest of justice transfer this action to the United States District Court for the Southern District of New York.

Respectfully submitted,

GOLDEN, POTTS, BOECKMAN & WILSON 2300 Republic National Bank Tower Dallas, Texas 75201 (214) 742-8422

By s/Geo. Garrison Potts
GEO. GARRISON POTTS

MEMORANDUM ENDORSEMENT ON MOTION DATED OCTOBER 21, 1974

October 18, 1974

MOTION DENIED.

SO ORDERED.

s/ Robert J. Ward U.S.D.J.

FILED OCT. 21 1974 U.S. DISTRICT COURT S.D. OF N.Y. 0,

MEMORANDUM ENDORSEMENT ON MOTION DATED SEPTEMBER 25, 1974.

October 18, 1974

MOTION DENIED

SO ORDERED.

s/ Robert J. Ward U.S.D.J.

FILED OCT. 21 1974 U.S. DISTRICT COURT S.D.N.Y. OF N.Y. UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ROSTAM PUBLISHING CO.,

: 74 Civ. 868

R. J. W.

Plaintiff, :

-against-

AFFIDAVIT

ENNIS GUSINESS FORMS, INC. (ENTEX PUBLICATION DIVISION),

Defendant.

STATE OF NEW YORK]

: 99.:

COUNTY OF NEW YORK)

STANLEY M. ESTHOW, being duly sworn deposes and says:

- 1. I am the attorney for the plaintiff herein and submit this affidavit in opposition to defendant's order to show cause why the present action should not be stayed in favor of this action' proceeding in Texas wherein the plaintiff would be the defendant.
- ENNIS motion to transfer, the factual matters pertaining to the propriety of such treatment and has by its order dated August 1, 1974, denied their application. For the purpose of defendant's present application this Court has plready determined the propriety of the Southern District of New York as the place for the trial of this action.

 There is no point at this time in rehashing the arguments previously made to this Court resulting in the order of August 1, 1974, denying the motion to transfer.
- 4. Having determined that the Southern

 District of New York was a proper forum for the trial of this action I will address myself to the matter of pending

litigation in the United States District Court for the Northern District of Texas and Mr. Oliensis' emphasis thereon.

The present action was instituted by the 5. service of a summons issued out of the Supreme Court, New York County, to the defendant ENNIS, Ennis, Texas. Service was made by the Sheriff in Texas, on December 1, 1971 Exhibit "A". The defendant appeared in this action by the present attorneys for the defendant in this district Exhibit "8". Almost immediately the defendant's attorney, Mr. Oliensis, contacted me with a request that pleadings be held in abeyance for a period of time so that he could famaliarize himself with the transaction between the parties and that after having done so he would be in communication with me for the purpose of determining whether or not there was any element of liability on the part of his client and in that event efforts would be made to explore the possibility of settlement. I was agreeable to such handling but during the next several months, despits numerous communications between myself and Mr. Oliensis, no progress was being made other than the fact that I was exchanging additional information with Mr. Oliensis concerning the factual basis for the litigation. When nothing constructive was happening and on July 5, 1972, 1 served a verified complaint, the time for such service having been extended indefinitely pending the foregoing discussions. The verified complaint was rejected by Mr. Oliensis because it sought to recover an amount in excess of the amount stated in the summons, and that it was not timely served. I immediately communicated with Mr. Oliensis by telephone, and stated my position to the effect that the service of the complaint

was proper in that my time to serve it had been extended as indicated above and that since no settlement seemed to be forthcoming it was time to resume the litigation. He then advised me that the matter of the service of the complaint should be held in abeyance while arrangements were made to have him meet with my clients in New York City, and that if that Failed, that we would continue with the litigation. I advised Mr. Oliensis by letter that this was satisfactory, Exhibit "C".

6. A conference was subsequently held at Mr. Cliensis' office on August 8, 1972, which was inconclusive. A proposal was made by Mr. Oliensis which was unsatisfactory to my client and a counter proposal was made to Mr. Oliensis by letter and under date of April 26, 1973, In referring to my letter of April 25, 1973, Mr. Oliensis stated:

"It was a little disappointing, since I hoped it might be possible for us to work thirds out without a prolonged litigation".

7. From April 27, 1973 until August 1, 1973, I had several additional communications with Mr. Oliensis and it was not until August 1, 1973, that he favored me with a reply to my letter of August 25,19/3. He also suggested in that letter as follows:

"As I advised you, I am leaving for Europe this Friday, returning on Labor Day. My suggestion is that you, your principals and I meet upon my return and go through the items one by one. By that time, I wil! have received from Ennis the factual material that they have on the claims asserted by Rostam. I would hope that, in this matter, we can dispose of the dispute without further litigation. If we are unsuccessful, I will have someone from my office step into the matter and, I can assure you, we will proceed expeditiously

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The above procedure is suggested on the assumption that there will not be litigation activity or service of papers of any kind during my absence. One of Ennis' chief incentives in attempting to resolve this matter amicably is the avoidance of further legal expenses. Any attempt to move' the situation into a litigation frame of reference would compel us to respond and would, I am afraid, adestroy any chance of amicable disposition".

My clients were agreeable. On September 10, 19/3, I spoke to Mr. Oliensis and a further conference was arranged at his office for September 19, 1973, at which time there was a disclosure by the defendant's representatives of the factual situation relating to the defendant's shipping procedures involving plaintiff's publications which cast a new light thereon and indicated to my clients that there were substantial breaches of their contracts with the defendant ENNIS which were now out in the open. Both sides agreed to consider the entire transaction and the litigation based on these new disclosures. In the mean time, it was my agreement with Mr. Oliensid that the matter of further pleadings would be held up for a period of time.

8. On October 9, 1973, by letter, I advised Mr. Olimpsis as follows:

"If a satisfactory settlement cannot be arrived at within the next several days, I would appreciate your advising me of that fact so that we may stipulate both as to the amendment of the complaint as indicated, and with respect to the filing or answer on behalf of your client".

- 9. I had additional telephone conversations with Mr. Oliensis, pursuing the matter of settlement, and on December 17, 1973, Mr. Oliensis submitted to me a revised offer which I submitted to my clients.
- 10. On January 31, 1974, I wrote to Mr. Oliensis rejecting the offer and stated in that letter:

"la accordance with our previous understanding, I am ancluding a copy of the Verified Complaint with which has been redrafted ***".

terminated by my client and the litigation was scheduled to continue with an answer to the action which had then been pending in the Supreme Court, for the State of New York, for 26 months. It was only then that ENNIS started its action in Taxas in a state court and although Mr. Olieneis refers to a filing date of February 20, 19/4, as indicated in his papers service was never effected until we ultimately received a summons and complaint out of that Court from the Scoretary of State of Texas on June 1, 19/4. In the Interim, the defendant had moved this action into the Federal Court and had made the motion for a transfer to Texas, along with an objection to the complaint which effectively tied up plaintiff's further proceedings until this Court's decision of August 1, 19/4.

- patience in dealing with the defendant during the pendency of the suit in the Supreme Court of the State of New York, since it sincerely sought to avoid litigation, if possible, Mr. Oliensis' attempt to characterize ROSTAM'S defective proceedings in the action brought by ENNIS in Texas as harassment is unfounded and uncalled for.
- and adversely affected by defendant ENNIS' tactics in the United States District Court in Texas, and has already been caused to expend substantial amounts of money for legal feed in its holding actions and has tried to minimize these expenses, particularly since the decision of this Court on August 1, 1974 properly stated that the

a ction was to be tried in this jurisdiction. Under Rule 13(a) of the United States Rules of Civil Procedure, the defendant ENNIS' claims in Texas are a compulsory counterclaim in this action.

- charade".Without belaboring the point if such it be, it is of his own making. If there has been delay in the processing of this action in New York the review of the facts above places the responsibility solely on the shoulders of the defendant and its New York attorney. For the defendant ENNIS to say that it chose Texas, while the plaintiff HOSTAM chose New York, without recognizing the lapse of over 2-% years is to ignore the realities of this matter.
- 14. One final word must be stated to indicate the forebearance and character of the plaintiff in dealing with the defendant's attorney in that 2-% year period. In dealing with the defendant ENN,IS, they discounted each and every one of their bills for printing' totaling in the neighborhood of \$1,000,000.00. On September 10, 1970, the defendant ENNIS wrote to the plaintiff as follows:

"We at Ennis Business Forms Inc. have been delighted with the association with Rostam Publishing, Inc."

My clients have attempted to do the right thing in trying to dispose of this litigation amicably and are now faced with the unfounded charge of acting in bad faith. The shoe is on the other foot.

CTANLEY W ESTROW

Sworn to before me this day of 6, 1974.

NOTICE OF APPEAHANCE HECETVED FROM KAYE, SCHOLER, FIGHMAN, HAYS & HANSLEH, ESGS. Dated: December 30, 1971

(Copy unavailable in time for this application)

October 22, 1974 .

Hon. Robert J. Ward United States District Court Southern District of New York Foley Square New York, N.Y. 10007

Re: Rostam v. Ennis
Plaintiff's motion to stay Texas action

Dear Judge:

I am writing to request leave to re-argue so much of Your Honor's decision as relates to your refusal to stay the Texas proceeding. In brief, the reasons for the request are as follows:

- 1. The plaintiff's amended complaint alleges in Paragraph Ninth that the August 1971 issue of Police Detective was improperly manufactured and in Paragraph Twenty-Seventh that the August 1971 issues of Police Detective, Real Detective and Adventure for Men were not shipped for at least 3 weeks beyond their scheduled shipping date, all of the foregoing constituting a breach of defendant's contract with the plaintiff. The August 1971 issues of Police Detective, Real Detective and Adventure for Men are the three issues for which Ennis brought suit in Texas, as more fully appears in their original petition submitted to the District Court of Dallas County, Texas.
- 2. Since the plaintiff's action encompasses the same periodicals involved in defendant's complaint in Tomas, both actions arise from obviously the same source.

- 3. Rostam's action was commenced in New York in December 1971. Ennis' action was commenced in Texas by service upon Rostam between May 20th and June 1, 1974. Rostam's action was therefore prior and pending when the Ennis action was started.
- 4. Rule 13s of the United States Rules of Civil Practice is mandatory and is headed "Compulsory Counterclaims". The language of the statute is not permissive and was intended to insure against the undesirable possibility of a defendant bringing an action in another District Court on a matter arising out of the same facts set forth in the complaint in the original action. Under that rule Engis "shall state as a counterclaim" the action that it has commenced in the Texas court since it arises out of the transaction or occurrence that is the subject matter of the plaintiff's action in this court.
- 5. In order to establish in Texas the late shipments and their effect upon plaintiff's national distribution, wholesale newsdealers, retailers and purchasers, plaintiff would be required to duplicate the same testimony that it would produce in the proceeding pending in this court since the same employees of Kable News Co. and the other witnesses referred to in plaintiff's papers in opposition to defendant's motion to transfer, denied by this court. The net result of this court's decision to deny a stay actually results in practice in a reversal of this court's previous order and accordingly, will work a hardship on Rostam in that it will be required to try the same issues in Texas and in New York.

I respectfully request that on the basis of the foregoing this court reconsider its oral decision to deny plaintiff's request for a stay and to require Rule 13s to be followed by the defendant who should be required to set up the complaint in the Texas action as a compulsory counterclaim herein.

Respectfully submitted,

Stanley M. Estrow

SME:nr

cc: Kaye, Scholer, Fierman, Hays & Handler

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER 425 PARK AVENUE NEW YORK, N Y. 10022

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RONALD L. UNGER ELIZABETH HEAD HENRY K UMAN S L WARHAFTIG JEFFREY M EPSTEIN

October 31, 1974

JACOR SCHOLER
JAMES SHAES
NATHANIELE JACKSON
RICHARD C FLI, CH
JAY O KRAMER
SIENLY A DIA-HOND
JAMES B HENRY
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Honorable Robert J. Ward United States District Judge United States District Court Southern District of New York Foley Square New York, New York 10007

> Rostam Publishing Co. v. Ennis Business Forms, Inc.

Dear Judge Ward:

Rostam's letter to the Court, dated October 22, 1974, seeks reargument of Your Honor's decision of October 18, 1974. Rostam has made not the slightest attempt to comply with the requirements for a motion for reargument, set out in the General Rules of this Court, Rule 9(m), and, for this reason, without more, its letter is a nullity.*

Rostam's motion is, in any event, wholly without merit, both in law and in fact. Its chief contention is that Rule 13(a) is "mandatory" and, apparently, that the Court is therefore without power to order that a compulsory counterclaim not be tried in a particular action. This position is totally wrong as a matter of law, see, e.g., FRCP Rules 21 and 42(b), and Ennis will brief this point, if the Court desires.

*

So far as defendant is aware, the Court's order on the motions heard on October 18 has not yet been filed, and it would still be timely for Rostam, if it were so advised, to file a proper motion for reargument.

115 KAYE. SCHOLER, FIERMAN, HAYS & HANDLER Honorable Robert J. Ward October 31, 1974 Factually, Rostam is equally in error. As pointed out in Ennis's October 18 memorandum, it was actually Ennis's action, not Rostam's, which was commenced first. within the meaning of the Federal Rules, Ennis's complaint in Texas having been filed February 15, 1974, while Rostam's complaint in New York was not filed until February 25, 1974 at the earliest; its present amended complaint was not even served until September 30. Rostam's statements as to supposed New York witnesses is a fiction. The only genuine witness in the New York area who can testify to competent and relevant matters relating to the August, 1971, issues is Rostam's principal, Mr. Stampleman. Finally, Ennis wishes to advise the Court of developments since the October 18 argument. On Monday of this week, October 28, Ennis, in accordance with the direction of the Court on October 18, filed its answer herein and, as ordered by the Court, no counterclaim was included. I am advised that Rostam this week filed its answer in Texas and deliberately elected to violate this Court's order, incorporating its entire claim here as a counterclaim pleaded in that answer. (A copy of Rostam's Texas answer has not yet been received, but it will be transmitted to the Court upon receipt.) Accordingly, as a result of Rostam's own conduct -- in violation of this Court's order -- the entire controversy is now before the Texas Courts. Rostam urges that it does not wish "to try the same issues in Texas and New York," and Ennis notes that that objective can now be achieved, as a result of Rostam's own choice, by staying the New York action and permitting the matter to proceed in Texas. Andre James SO:ek cc: Stanley M. Estrow, Esq. - 2 -

116 KAYE, SCHOLER, FIERMAN, HAYS & HANDLER 425 PARK AVENUE NEW YORK, N.Y. 10022 (212) PLAZA 9-8400 MILTON HANDLER
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November 4, 1974

STANLEY M. FULD MAROLD L. FIERMAN SPECIAL COUNSEL

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CABLE ADDRESSES
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RAYEMACLER NEUILLY/SEINE

TELEX HUMBERS
NEW YORK DOMESTIC MESSAN
NEW YORK INT'L 234960
PORIS: LEFEBYRE 6297F

Honorable Robert J. Ward United States District Judge United States District Court Southern District of New York Foley Square New York, New York 10007

Re: Rostam Publishing Co. v.

Ennis Business Forms, Inc.

Dear Judge Ward:

We respectfully transmit herewith a copy of the answer and counterclaims served by Rostam Publishing in the United States District Court for the Northern District of Texas, which was referred to in our letter to the Court, dated October 31, 1974.

Respectfully yours,

SO:ek Enclosure

cc: Stanley M. Estrow, Esq.

ANSWER

- - - - - x

SAME TITLE

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The defendant, Rostam Publishing, Inc., for its answer to the plaintiff's original petition or complaint herein, states as follows:

FIRST: Plaintiff denies each and every allegation set forth in paragraphs III, IV and V thereof.

SECOND: With respect to paragraph I plaintiff denies knowledge or information sufficient to form a belief as to the allegation that plaintiff is a Texas corporation; defendant denies that it is now or has at any time in the past been doing business within the State of Texas and further alleges that the contracts entered into for plaintiff's performance of services for the defendant was made, entered into and consummated in the State of New York.

THIRD: With respect to paragraph II the defendant denies knowledge or information with respect to plaintiff's alleged system of bookkeeping and further denies that the plaintiff furnished to this defendant any goods, wares, merchandise, materials and services which were at the time of the sale delivery, furnishing and rendition thereof reasonably worth the sum of \$21,798 or any part thereof.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE THE DEFENDANT ALLEGES:

FOURTH: That heretofore and on or about the first day of December, 1971 the defendant herein, by action commenced in the Supreme Court of the State of New York, County of New York, in which the present defendant Rostam Publishing, Inc. was plaintiff, and the present plaintiff Ennis Business Forms, Inc. was defendant, commenced an action against the said Ennis Business Forms, Inc. for damages for breach of contract which action, inter alia, encompassed damages arising out of the Ennis Business Forms, Inc. production and shipment referred to as the August 1971 issues of Police Detective, Real Detective, and Adventure for Men in the exhibits annexed to plaintiff's original petition or complaint.

FIFTH: That the claim being asserted herein by
Ennis Business Forms, Inc. arising as it does out of the
same facts on which the action was brought by Rostam
Publishing, Inc. in the Supreme Court of the State of New
York was encompassed by and arose out of the same facts
as set forth in the complaint issued by Rostam Publishing, Inc.

SIXTH: That heretofor and in or about the month of February 1974 said Ennis Business Forms, Inc. caused the action pending in the Supreme Court of the State of New York in which Rostam Publishing, Inc. was plaintiff and Ennis Business Forms, Inc. was defendant to be removed

from the Supreme Court of the State of New York to the United States District Court for the Southern District of New York, bearing index number 74 Civ. 868.

SEVENTH: That thereafter the action brought by Ennis Business Forms, Inc. as plaintiff against Rostam Publishing, Inc. as defendant in the F 116th Judicial District Court of Dallas County, Texas was removed to the United States District Court for the Northern District of Texas, Dallas Division, bearing index number Civ. 3-74-558-C.

the defendant Ennis Business Forms, Inc. in the action pending in the United States District Court for the Southern District of New York made an application to that Court pursuant to 28 USC Section 1404(a) to transfer that action to the Northern District of Texas which motion was denied by the United States District Court for the Southern District of New York on August 1, 1974 with that Court holding that the proper place for trial was in the United States District Court for the Southern District of New York.

NINTH: That pursuant to Rule 13A of the Federal Rules of Civil Practice the cause of action alleged by the plaintiff herein, Ennis Business Forms, Inc., is a compulsory counterclaim in the action pending in the United States District Court for the Southern District of New York, between the parties hereto and that this Court

should therefore direct the transfer of this action to the United States District Court for the Southern District of New York in accordance with Federal Rules of Civil Practice 13A.

AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE AND BY WAY OF A FIRST COUNTERCLAIM HEREIN THE DEFENDANT ALLEGES:

TENTH: That at all times hereinafter mentioned, defendant was and still is a New York corporation, having its principal place of business in the Borough of Manhattan, County, City and State of New York.

ELEVENTH: That at all times hereinafter mentioned, defendant was and still is in the business of publishing periodicals intended for sale upon newsstands throughout the world.

TWELFTH: That as alleged in the original petition and complaint herein, plaintiff was and still is a foreign corporation having its principal place of business in Ennis, Texas.

THIRTEENTH: That upon information and belief, at all times hereinafter mentioned, plaintiff owned and operated manufacturing facilities for the printing, production and shipping of periodicals both in Ennis, Texas (ENTEX PUBLICATION DIVISION), and in Dallas, Texas (STORM PRINTING COMPANY DIVISION).

FOURTEENTH: That heretofore and at all times hereinafter mentioned, defendant was the publisher of

periodicals entitled the wrestler, world boxing, boxing annual, inside wrestling, police detective, police detective yearbook, men in adventure, men in adventure yearbook, international boxing, adventure for men, adventure for men yearbook, real detective, real detective yearbook, how to date and mate through astrology, action sports baseball yearbook, and action sports baseball guidebook.

December 1969, defendant, through its duly authorized officer, received a written proposal from plaintiff for the production of certain of defendant's publications which was accepted by defendant at its office in New York City, under the date of January 16, 1970. Subsequent thereto, said agreement was further modified by memoranda from plaintiff increasing printing prices on certain of defendant's publications under dates of May 21, 1970 and June 2, 1970.

- (a) The contract annexed to the complaint as Exhibit "A", and dated December 22, 1969, effective as of January 16, 1970, set forth prices, specifications and other terms for what plaintiff characterized as the "Adventure" and "Detective" series. The titles included in these categories were:
 - A. Police Detective
 - B. Police Detective Annual
 - C. Real Detective
 - D. Real Detective Annual
 - E. Men in Adventure Yearbook

modifications, plaintiff undertook to perform the required manufacturing operations in a good and workmanlike manner and to produce said publications in accordance with time schedules to be agreed upon between the parties, and to perform all of such procedures in sufficient time to enable each of defendant's periodicals to be received by local wholesale newsdealers so as to be placed on sale by the retail newsdealers on a fixed, pre-arranged date. That plaintiff's services included the use of plaintiff's private trucking facilities, along with selected common carriers for expeditious deliveries, at a flat rate per hundred-weight to reach the various wholesale local distributors and in turn the retail newsdealers in time for the fixed on-sale date.

SEVENTEENTH: That at all times hereinafter mentioned, defendant duly performed all the terms and conditions required by said agreements and modifications thereof on the part of defendant herein.

and delivered to plaintiff for production, amongst other titles, as aforesaid, the August, 1970 edition of POLICE DETECTIVE, the February 1971 edition of POLICE DETECTIVE, the January 1971 edition of REAL DETECTIVE, the June 1971 edition of REAL DETECTIVE, the June 1971 edition of REAL DETECTIVE and the August 1971 issue of POLICE DETECTIVE, pursuant to the agreements as aforesaid.

NINETEENTH: That plaintiff neglected and failed to properly perform the manufacturing processes as product for in the agreement between the parties, in that in one course of manufacturing said five issues, plaintiff failed to include and incorporate numerous pages of editorial material previously supplied by defendant to plaintiff and caused said issues to be shipped to the retail newsdealers with said sections either missing, duplicated, or from the wrong magazine, resulting in said issues being offered to the public in an incomplete, unreadable and unsalable condition.

TWENTIETH: That defendant paid plaintiff the sum of \$38,745.35 for printing said five defective issues.

as aforesaid, plaintiff breached its contract with defendant in producing said issues in that the same were not produced in a good and workmanlike manner and defendant was caused to and did expend the additional sum of \$21,997.40 fer preparation of editorial content and shipping costs therefor, all to its damage in the total sum of \$60,742.75, together with a loss of good will on the part of purchasers (in an amount to be fixed by the court) who, having purchased said editions would have failed and refused to purchase subsequent editions by reason of such defects.

AS AND FOR A THIRD SEPARATE DEFENSE AND SECOND COUNTERCLAIM

TWENTY-SECOND: Defendant repeats and realleges each and every allegation contained in paragraph "TENTH" through "SEVENTEENTH" hereof, with the same force and effect as though set forth at length herein.

TWENTY-THIRD: That in entering into the agreement with plaintiff for the production of the publications as aforesaid, defendant made known to plaintiff and plaintiff acknowledged to defendant that the publications to be manufactured by defendant for defendant were intended for newsstand sale and distribution and that the production would be scheduled to provide for shipments to the various wholesale and retail dealers in said publications on a basis consistent with the frequency of publications of the particular periodical, either on a monthly, bi-monthly, quarterly or annual frequency; that in accordance with said understanding, agreement and arrangement, defendant and plaintiff entered into various schedules of production setting forth the various dates for the commencement of production, for completion of shipments for the individual issues of each of the periodicals published by defendant herein and the newsstand on-sale dates, which schedules plaintiff agreed to comply with.

TWENTY-FOURTH: That in entering into the

agreement with defendant, plaintiff was informed by defendant that the production dates were consistent with and pursuant to arrangements by defendant with its national distributor, Kable News Company, which company in turn had arranged the distribution schedule for defendant's periodicals to conform with and coincide with distributing procedures in the trade generally, with the ultimate objective of having defendant's periodicals arrive at the various wholesalers and retailers on a predetermined schedule and in time for distribution to the retail newsstands on or before a given "on-sale date".

made by defendant with Kable News Company, as aforesaid, defendant advised plaintiff that the aforementioned schedules provided for maximum exposure for defendant's titles for the frequency of publication referred to above so that a monthly publication would receive a 30-day exposure; a bi-monthly publication would receive a 60-day exposure; a quarterly publication would receive a 90-day exposure; etc.; and that the cover dates for the various publications were advanced sufficiently to provide the exposure as aforesaid on newsstands during the same time period as competitive publications produced by other publishers, which would bear the same cover dates and that any interruption or delay in the production and shipping as called for by the schedules would result in

reduced sales periods and diminished sales for defendant's periodicals.

TWENTY-SIXTH: That in addition to the foregoing, defendant advised plaintiff that advertising would be solicited from advertisers for publication in defendant's periodicals with the advertising schedules coinciding with the on-sale dates scheduled and provided for in defendant's arrangements with Kable News Company, its distributor as aforesaid, and with plaintiff, the printer of plaintiff's periodicals, as aforesaid, and defendant further advised plaintiff that any interference with the schedules or delay in shipping would result in advertiser's promotions appearing on newsstands at times or periods other than those selected and predetermined by defendant's advertisers which would result in either advertiser's refusal to pay for the advertising, or by reason of the failure to receive the anticipated results, would refuse to continue to advertise in defendant's publications.

TWENTY-SEVENTH: That defendant, in producing its publications as aforesaid, developed a cash flow for its anticipated income and for additional financing based on the frequency and continuity as provided in the schedule of production arranged between defendant and plaintiff herein and plaintiff was so advised by defendant; plaintiff entered upon the production of defendant's periodicals with full knowledge of the need for prompt and consistent

performance, direct and expedient shipping channels, and that time was of the essence, and that defendant's publishing stability and cash flow was dependent upon prompt performance by plaintiff herein.

TWENTY-EIGHTH: That upon information and belief, between the period from October 1, 1970 through June 30, 1971 plaintiff, without knowledge thereof upon the part of defendant, caused defendant's periodicals to be shipped to the wholesale and retail newsdealers by means other than plaintiff's trucking facilities or by direct shipments through common carrier, and by means substantially slower and unsuitable for delivery within the scheduled time periods, and in addition completing shipments some ten to thirty days later than the scheduled completion dates and causing to be issued to defendant and to defendant's national distributor, Kable News Company, erroneous, misleading and untrue completion cards; that lacking information to the effect that plaintiff was willfully concealing and misrepresenting the completion dates as aforesaid and the substitute and unacceptable method of shipping, defendant was unable to take any steps to rearrange on-sale dates with the wholesalers and retailers, to redate upcoming issues, to reschedule advertising and "on-sale dates", to rearrange financing, and in addition, defendant's periodicals were caused to be placed on sale during time periods which were

disadvantageous to defendant in that competitor's publications bearing the same cover dates had by then completed their periods of sale or had been withdrawn from sale with defendant's periodicals appearing on sale after the competition's normal sales period, and by reason of such cover dates, appeared to be out of date from the viewpoint of retail purchasers based on the practices and procedures adopted by competitive publishers and defendant herein for the dating and offering of such publications to the general purchasing and reading public.

TWENTY-NINTH: That by reason of the deception, misrepresentation and fraud of plaintiff in issuing said completion cards and substituting slower, inferior and improper shipping procedures as aforesaid, defendant has been damaged in the sum of \$410,592.29.

AS AND FOR A FOURTH SEPARATE DEFENSE AND THIRD COUNTERCLAIM

THIRTIETH: Defendant repeats and realleges
each and every allegation contained in paragraph "TENTH"
through "SEVENTEENTH" hereof with the same force and
effect as though set forth at length herein.

THIRTY-FIRST: That heretofore and in or about the months of March and April, 1971, defendant, in accordance with the previously arranged production schedules, provided plaintiff with all of the editorial material, advertising copy and shipping galleys for defendant's

periodicals, i.e., ADVENTURE FOR MEN YEARBOOK NO. 6, INSIDE WRESTLING, JULY 1971, WORLD BOXING, JULY 1971, THE WRESTLER, JULY 1971, POLICE DETECTIVE, AUGUST 1971, REAL DETECTIVE, AUGUST 1971, and ADVENTURE FOR MEN, AUGUST 1971.

THIRTY-SECOND: That at or about the time that said material was issued to plaintiff for production as aforesaid, plaintiff advised defendant that its printing plant in Ennis, Texas was having certain labor problems but that there would be no interruption or interference with the production and shipping of defendant's periodicals since plaintiff would be employing the facilities of its printing plant in Dallas, Texas (STORM PRINTING CO.) and would be completing the binding and shipping by the use of their executive and other supervisory personnel at their plant in Ennis, Texas.

THIRTY-THIRD: That plaintiff reported to defendant that INSIDE WRESTLING, JULY 1971, WORLD BOXING, JULY 1971 and THE WRESTLER, JULY 1971, had completed shipments on May 18, 1971, substantially later than scheduled, whereas in truth and in fact, said shipments were improperly labeled and had to be recalled, and their cover dates were unsuitable for newsstand distribution at that late date; that in fact said issues were subsequently destroyed by plaintiff. ADVENTURE FOR MEN YEARBOOK NO. 6 had been included in the improperly labeled shipments which had

been recalled and was also destroyed. In addition, plaintiff advised defendant that POLICE DETECTIVE, AUGUST 1971, REAL DETECTIVE, AUGUST 1971, ADVENTURE FOR MEN, AUGUST 1971, which had been scheduled for completion on May 17, 1971, had been shipped completely by May 24, 1971, whereas in truth and in fact, said information was false, fraudulent and misleading in that shipping was not completed until June 11, 1971.

plaintiff advised defendant that it would not be able to print subsequent editions of defendant's periodicals despite its assurances that the strike as aforesaid would not interfere with their production; that at the time of the receipt of such information from plaintiff, defendant had submitted to plaintiff additional editorial material for subsequent editions of its periodicals, much of which had time value in that unless it appeared on sale to the reading public at the time scheduled by defendant, the information would be stale and of little or no value to the public and would result in the diminution in value of defendant's periodicals to the purchaser, thereby reducing or eliminating the possibility of selling the same on the newsstands.

THIRTY-FIFTH: That by reason of plaintiff's failure to produce and timely ship INSIDE WRESTLING, JULY 1971, WORLD BOXING, JULY 1971 and THE WRESTLER, JULY 1971, defendant suffered damage in that all of the editorial expense in preparing photographs and editorial material, typesetting, camera work, advertising and newsstand income was lost to defendant, together with the loss of good will in that the continuity of the appearance of defendant's publications on the newsstands was seriously interfered with.

shipping the August 1971 issues of POLICE DETECTIVE, REAL
DETECTIVE, and ADVENTURE FOR MEN, by three (3) weeks or
more beyond the scheduled shipping date, and by plaintiff's
choice of improper and inefficient means of transportation, said periodicals, in many cases, were not placed
on sale by the wholesale and retail news dealers and were
returned unsold to defendant's national distributor and
to defendant herein, resulting in a loss of newsstand income,
shipping expense, editorial expense and overhead expense,
in addition to the loss of good will on the part of its
regular purchasers, in an amount to be fixed by the court.

THIRTY-SEVENTH: That by reason of the premises, defendant was damaged in the sum of \$11,698.63, together with the loss of good will as aforesaid.

AS AND FOR A FIFTH SEPARATE DEFENSE AND FOURTH COUNTERCLAIM

THIRTY-EIGHTH: Defendant repeats and realleges

each and every allegation contained in paragraph "TENTH" through "SEVENTEENTH" and "TWENTY-THIRD" through "TWENTY-SEVENTH" hereof, with the same force and effect as though set forth at length herein.

THIRTY-NINTH: That upon receipt of the information from plaintiff on or about May 24, 1971, that plaintiff was unable to continue with the production of defendant's periodicals pursuant to contract, defendant found itself without printing facilities and was caused to seek other sources for the manufacturing of defendant's periodicals.

FORTIETH: That thereafter and on or about the 21st day of June, 1971, defendant secured other printing facilities for the production of defendant's periodicals.

FORTY-FIRST: That by reason of the action of plaintiff in cancelling its agreement with defendant as aforesaid, defendant was unable to produce the following issues of defendant's periodicals, resulting in a loss of continuity, loss in sales, loss in advertising income and loss of cash flow:

THE WRESTLER, July 1971 and September 1971 WORLD BOXING, July 1971 and September 1971 INSIDE WRESTLING, July 1971 and September 1971

FORTY-SECOND: That by reason of the breach of contract as aforesaid by plaintiff, defendant was damaged in the sum of \$26,000.00, together with a loss of good will in an amount to be fixed by the court.

AS AND FOR A SIXTH SEPARATE DEFENSE AND FIFTH COUNTERCLAIM

FORTY-THIRD: Defendant repeats and realleges
paragraphs "TENTH" through "SEVENTEENTH" and "TWENTYTHIRD" through "TWENTY-SEVENTH" hereof, with the same force
and effect as though set forth at length herein.

FORTY-FOURTH: That by reason of the failure of the plaintiff to perform said contract, and to produce and ship defendant's publication at the times agreed upon, and by the various direct and rapid methods of transportation theretofore agreed upon, the on-sale periods of defendant's publications were seriously and adversely affected, in that their sales periods were shortened, and made non-competitive with similar publications offered to the buying public at the retail newsstands.

FORTY-FIFTH: That by reason of the breach of contract, as aforesaid, defendant's sales of its publications were reduced by an amount equal to 15% of the gross distribution, on all issues of defendant's periodicals printed and shipped by the plaintiff, such 15% loss in sales of gross distribution representing in total the sum of \$418,160.53, which additional sum defendant would have and should have received from the newsstand sales, had the plaintiff performed the printing and shipping of defendant's publications in the manner and at the times agreed upon.

FORTY-SIXTH: That defendant has been damaged in the sum of \$418,160.53.

AS AND FOR A SEVENTH SEPARATE DEFENSE AND SIXTH COUNTERCLAIM

FORTY-SEVENTH: Defendant repeats and realleges paragraphs "TENTH" through "SEVENTEENTH" and "TWENTY-THIRD", "TWENTY-FOURTH" and "TWENTY-EIGHTH" hereof, with the same force and effect as though set forth at length herein.

FORTY-EIGHTH: That in addition to the failure to properly produce and timely ship defendant's periodicals, as aforesaid, defendant has now been advised and billed by its national distributor, Kable News Company, for shortages in shipments to various wholesale newsdealers covering the period as aforesaid.

FORTY-NINTH: That under date of September 29, 1973, the defendant was billed the sum of \$7,227.30 for the shortages in shipments, as aforesaid.

FIFTIETH: That the defendant has been damaged in the sum of \$7,227.30.

WHEREFORE, defendant prays that plaintiff take nothing and that defendant have judgment against plaintiff.

On the First Counterclaim in the sum of \$60,742.75;

On the Second Counterclaim in the sum of \$410,592.29;

On the Third Counterclaim in the sum of \$11,698.63;

On the Fourth Counterclaim in the sum of \$26,000.00;

On the Fifth Counterclaim in the sum of \$418,160.53;

On the Sixth Counterclaim in the sum of \$7,227.30; together with appropriate interest, costs and disbursements.

Respectfully submitted,

GOLDEN, POTTS, BOECKMAN & WILSON 2300 Republic National Bank Tower Dallas, Texas 75201 (214) 742-8422

By s/David Herndon
DAVID HERNDON

Rostam Publishing Co. v. Ennis Business Forms, Inc. 74 Civ. 868

The Court deems plaintiff's counsel's letter of October 22, 1974 a motion to reargue its denial of plaintiff's motion to stay the action pending in the United States District Court for the Northern District of Texas, Dallas Division, entitled Ennis Business Forms, Inc. v. Rostam Publishing, Inc.

Upon consideration of the aforementioned letter and defendant's counsel's letters of October 31 and November 4, 1974, plaintiff's motion to reargue is denied.

It is so ordered.

Dated: November 6, 1974

U. S. D. J.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

ROSTAM PUBLISHING CO.,

74 Civ. 868

Plaintiff,

-against-

ENNIS BUSINESS FORMS, INC. (ENTEX PUBLICATION DIVISION),

NOTICE OF APPEAL

Defendant.

Notice is hereby given that ROSTAM PUBLISHING CO., the plaintiff above-named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order of Judge Robert J. Ward, dated October 18, 1974 and docketed with the Clerk of this Court on October 21, 1974, denying the plaintiff's motion for a stay of defendant ENNIS BUSINESS FORMS, INC., from proceeding with its action against the plaintiff herein in Texas, and from the Order of Judge Robert J. Ward dated November 5, 1974 denying plaintiff's motion for leave to argue its motion for a stay entered in this action on the 6th day of November, 1974.

Dated: November 15, 1974

Stanley M. Estrow Attorney for Plaintiff Rostam Publishing Co. 529 Fifth Avenue

New York, New York 10017

TO: Clerk of the United States
District Court for the
Southern District of New York

Kaye, Scholer, Fierman, Hays & Handler Attorneys for Defendant Ennis Business Forms, Inc. 425 Park Avenue New York, New York 10022

NOTICE OF CROSS APPEAL

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SAME TITLE

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Plaintiff having filed, on November 19, 1974, a notice of appeal from the Order of Hon. Robert J. Ward, District Judge, dated October 18, 1974, denying plaintiff's motion to stay defendant from proceeding against plaintiff in a certain action in Texas, and from the further Order of Judge Ward, dated November 6, 1974, denying reargument of plaintiff's said motion, notice is hereby given that defendant hereby cross-appeals to the United States Court of Appeals for the Second Circuit from the related and simultaneous Order of Judge Ward, dated October 18, 1974 and entered herein on October 21, 1974, denying defendant's motion to stay plaintiff from further prosecution of this action pending determination of said Texas action.

Dated: December 2, 1974 New York, N.Y.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

By s/

A Member of the Firm
425 Park Avenue
New York, N.Y. 10022
(212) 759-8400
Attorneys for DefendantCross-Appellant

TO: Clerk of the United States
District Court for the
Southern District of New York

STANLEY M. ESTROW, ESQ. Attorney for Plaintiff



STATE OF NEW YORK) : SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 3 / day of JAN., 1975 deponent served the within Jair Appendix upon Kaye, Scholer, Freeman, Hays & Handler

attonrye(s) for Def. - App- Appellee

in this action, at 425 PACK Ave.
NY.C. 10022

the address(es) designated by said attorney(s) for that purpose by depositing at true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this

31 day of JAW.

1

, 1975.

WILLIAM BAREY

Notary Public, State of New York No. 43-0132945

Qualified in Richmond County Commission Expires March 30, 1976